Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BARRY WILLIAM LEVINE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During a contentious criminal trial, the district judge summarily held Petitioner, an attorney, in criminal contempt, without holding a hearing on the contempt charge. In his written order issued almost two weeks later, the judge stated, as his basis for holding Petitioner in contempt, that Petitioner's conduct over several days had "cumulatively" amounted to contempt, in that he had allegedly violated the judge's orders on evidentiary issues, and had allegedly attacked the judge's integrity by noting that virtually all of his rulings favored the prosecution. The court of appeals affirmed, holding that no actual obstruction of justice need be present before a judge may hold an attorney in contempt without a hearing, and that a judge may use his summary contempt power to punish an alleged contempt during trial even if he believes he has been personally insulted by the alleged contemnor. The questions presented are:

1. Whether due process is violated when, absent an actual obstruction of justice, an attorney is held in criminal contempt and imprisoned in the middle of trial without being provided with a hearing in which he has the opportunity to defend his actions.

2. Whether a trial judge who believes his integrity and impartiality have been attacked may, consistent with due process, summarily hold the attorney in contempt and imprison him, or must instead refer the matter to another judge for a hearing.

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Petitioner Barry Wm. Levine respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is reported at 27 F.3d 594. The opinion and order of the district court (App. 10a-62a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 29, 1994 (App. 1a-9a). A timely petition for rehearing was denied on September 15, 1994 (App. 63a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law."; the Sixth Amendment to the United States Constitution provides, in relevant part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." 18 U.S.C. § 401 and Fed. R. Crim. P. 42 are set forth in the appendix to this Petition at 95a-96a.

STATEMENT OF THE CASE

Petitioner, Barry Wm. Levine, was summarily found to be in criminal contempt, and sentenced to four hours of imprisonment, on November 19, 1992—the thirty-fourth day of a criminal trial spanning three months. The trial was extremely contentious and involved bitterly contested issues of race and politics. Mr. Levine's client, Leonard E. Briscoe, Sr., was charged with twenty-seven felony counts, including conspiracy, false statements, bribery, illegal gratuity, mail fraud and wire fraud. The other co-defendants, Lance H. Wilson—the former Executive Assistant to HUD Secretary Samuel Pierce—and M. David Steier, were similarly charged. Mr. Briscoe was acquitted of all charges save two of the gratuity counts.[1]

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[1] Another indictment, returned against Mr. Briscoe and another defendant in the Southern District of Florida, was transferred on Mr. Briscoe's motion to the District of Columbia in April 1992. Upon the government's "suggestion," Judge Harris transferred the case back to Florida. On Mr. Briscoe's behalf, Mr. Levine subsequently sought and obtained a writ of mandamus from the Court of Appeals for the D.C. Circuit on October 27, 1992, ruling that Judge Harris had no jurisdiction to transfer the case in the absence of a defense motion, and ordering the case to be returned to the District of Columbia. *In re Briscoe*, 976 F.2d 1425 (D.C. Cir. 1992). We note that this extraordinary order was received by Judge Harris in the midst of the hard-fought trial and it was shortly after this decision that Judge Harris began to threaten Mr. Levine with contempt.

The summary contempt finding, and the sentence of imprisonment, were issued toward the end of the government's case, with Ms. Patricia Abbamonte, the former controller of the various Briscoe companies, on the stand. Ms. Abbamonte testified on direct examination that Mr. Briscoe received kickbacks from his construction supervisor and from subcontractors, improperly moved funds back and forth among several bank accounts, failed to pay taxes, failed to pay subcontractors, and looted the Wedgewood Plaza Apartments ("Wedgewood") operating account.

One of the allegations made by Ms. Abbamonte was that Mr. Briscoe improperly diverted some $691,000 derived from rent revenues of the Wedgewood project and used that money to purchase a house and a car. On cross-examination, Mr. Levine sought to demonstrate that the money at issue was not rental income, but was money that came into the Wedgewood account from an entirely different entity, Briscoe Enterprises, which had in turn received this money from a bond closing on another of Mr. Briscoe's projects, located in Belle Glade, Florida. Mr. Levine thus intended to prove that the $691,000 at issue rightfully belonged to Mr. Briscoe and was not revenue from the Wedgewood project, and, hence, that it was perfectly proper for Mr. Briscoe to spend the money for a house and a car if he so desired.

To prove this point, Mr. Levine wanted to introduce Briscoe Ex. 46, a three-page audit certification letter signed by Ms. Abbamonte. Briscoe Ex. 46 showed both that the money paid to Briscoe Enterprises from the proceeds of the Belle Glade closing was proper, and that Ms. Abbamonte knew that the payment was proper. Thus, Mr. Levine believed, the document was the quintessential prior inconsistent statement of a witness.

At the beginning of Mr. Levine's cross-examination, Ms. Abbamonte conceded that in the Belle Glade closing, over $800,000 was disbursed to Briscoe Enterprises, and

that the propriety of the disbursement had been confirmed by an audit conducted by Deloitte & Touche. Ms. Abbamonte also agreed that the $800,000 was Mr. Briscoe's money, and that he was free to buy anything he wanted with it. Mr. Levine then asked Ms. Abbamonte whether she had written a letter to Deloitte & Touche about the propriety of the transaction. She answered that she had written many letters to Deloitte & Touche. At that point, Mr. Levine asked to have Briscoe Ex. 46 marked for identification. The court stated it would address the document's admissibility the following morning. App. 68a-69a.

The next day, the government objected to the admission of Briscoe Ex. 46 on three grounds: relevance, outside the scope of direct, and jury confusion. App. 70a-72a. At the ensuing side bar, the court stated that it had to make a Rule 403 determination "to figure out whether it is going to waste time, confuse the jury and so on." App. 75a. Mr. Levine argued that the document was highly relevant, and that its relevance outweighed the possibility of jury confusion and justified the expenditure of time. App. 75a-76a. Briscoe Ex. 46, Mr. Levine explained, contradicted Ms. Abbamonte's testimony on direct examination that Mr. Briscoe had looted $691,000: it showed that (i) monies approximating $800,000 properly came out of Belle Glade to Briscoe Enterprises; (ii) the transfer of the money was audited and given a clean bill of health; (iii) the monies then went into the Wedgewood account; and, therefore, (iv) the $691,000 in question was Mr. Briscoe's money to do with as he pleased. App. 76a. The court ultimately ruled that Briscoe Ex. 46 was not admissible under Rule 403. App. 77a. Mr. Levine then offered to redact portions of the document that might cause any confusion or waste of time. The court refused to admit it in redacted form. App. 79a-80a.

When Mr. Levine resumed his cross-examination of Ms. Abbamonte, she testified, as she had on direct examination, that Mr. Briscoe was entitled to the money that

came out of Belle Glade. She then added, however, that she was "going to assume [the transaction] was appropriate." App. 85a. She admitted that she had no evidence that it was inappropriate, but when Mr. Levine tried to establish that she in fact *knew* the transaction was appropriate, the government objected as asked and answered. Mr. Levine asked for a side bar conference. App. 85a.

At side bar, Mr. Levine renewed his motion to admit Briscoe Ex. 46 into evidence, because the document proved that Ms. Abbamonte knew that the transfer of Belle Glade money to Mr. Briscoe was appropriate, notwithstanding her reluctance on the stand to acknowledge as much. Mr. Levine explained:

> Yesterday she conceded that Mr. Briscoe was entitled to [in] excess of $800,000. Today she just said she assumes it. I want to prove that she knew it. I don't want an assumption.

App. 86a. The court nevertheless sustained the government's objection. App. 87a.

Returning to cross-examination, Mr. Levine next asked Ms. Abbamonte about a portion of the Belle Glade money —about $400,000 in construction overhead transferred to Briscoe Enterprises. As to this identified amount, Ms. Abbamonte replied that, while it was drawn down from Belle Glade and given to Briscoe Enterprises, she would "not make a certification, a legal judgment, an accounting judgment it was proper." App. 87a-88a. Mr. Levine then asked for another side bar, at which he attempted to explain to the court that the document was admissible as a prior inconsistent statement. Mr. Levine noted that, contrary to Ms. Abbamonte's testimony, "Briscoe 46 shows that she did, in fact, at that time make the certification. Her certification. She won't give it to me now. I can prove that she did it then. I would like permission of the Court to do that." App. 88a. The government restated its previous objection and added that Mr. Levine was badgering the witness. The court agreed with the government and told Mr. Levine to proceed. App. 88a.

Mr. Levine then showed the witness the document, and the government objected and asked for a side bar. App. 89a. Mr. Levine stated that this time he wanted to use the document pursuant to a different legal doctrine: to refresh Ms. Abbamonte's recollection as to whether she made the certification. The court would not permit Mr. Levine to do so. App. 89a-90a. Mr. Levine then returned to open court and asked the witness, without referring to any document, whether the sum of closing money transferred from Belle Glade to Briscoe Enterprises had moved in a proper way. Ms. Abbamonte responded that the money transfer occurred, but, she testified, she did not do an audit of Belle Glade. Mr. Levine asked her to agree that Belle Glade had been audited. The government objected. App. 90a.

Immediately thereafter, the court addressed Mr. Levine —who was standing at the lectern in open court—stating: "[w]e have covered this several times, Mr. Levine." App. 90a. In response, Mr. Levine stated (also in open court, from the place he was positioned when the court addressed him): "I want to get it straight, your Honor, because the witness is changing the testimony and I want to get it straight." App. 90a.[2] The court called for a side bar. At the bench, the government objected, whereupon Mr. Levine stated: "I will withdraw the remark, your Honor. I will move on." App. 90a-91a. The court then summarily held Mr. Levine in contempt, and sentenced him to four hours of incarceration to be served on that day. App. 91a. Because Mr. Levine had the responsibility to cross-examine a witness the following day, co-counsel asked Judge Harris to postpone imposition of the sentence. App. 91a. After the request was denied, Mr. Levine's attorney formally moved for a stay of the sentence before Judge Harris and later in the court of appeals. App. 93a-

[2] The court had earlier ruled that counsel should make all arguments regarding objections and trial procedures at side bar and not in the presence of the jury.

94a. The motions for a stay were denied,[3] and Mr. Levine served four hours in the holding cell of the courthouse that evening.

Nearly two weeks later, Judge Harris issued a written order explaining his reasons for summarily convicting Petioner of criminal contempt. Judge Harris justified his ruling on the grounds that Mr. Levine's conduct throughout the trial "cumulatively precipitated" the finding of contempt, and that the conduct directly preceding the contempt was merely "the proverbial straw that broke the camel's back." App. 12a, 59a.

The written order referred to 16 incidents, most occurring a number of days before the contempt citation, which the trial judge believed cumulatively justified summarily holding Petitioner in contempt.[4] These included three occasions on which Petitioner suggested at bench conferences that the court was favoring the government in its evidentiary rulings; the district court interpreted these comments as an accusation of bias and lack of integrity on the part of the trial judge. App. 23a, 27a-28a, 38a-40a.

Petitioner appealed his conviction on the grounds that each element of the crime of contempt had not been proven beyond a reasonable doubt, that the necessary prerequisite to the exercise of the court's summary contempt power—an "actual obstruction of justice"—was not present, and that the judge was so personally enmeshed in the proceedings that he should have referred the contempt matter to another judge for a hearing. The court of

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[3] At the time it denied the stay, the court of appeals had no record on which to assess whether Mr. Levine was entitled to the requested relief. Indeed, Judge Harris did not issue his order explaining his reasons for imposing summary punishment on Mr. Levine until 12 days later.

[4] None of the prior incidents was mentioned by the trial court as a basis for its ruling at the time the summary contempt conviction was issued.

appeals rejected each of these contentions. In doing so, the court held that no actual obstruction of justice need be present in order for a trial judge to issue a summary conviction for criminal contempt. App. 3a n.1. The court also held that, although a judge who believed that his personal integrity had been attacked by an alleged contemnor would be required to refer the matter to another judge for a hearing under most circumstances, such a procedure was not required if the judge used his summary contempt power to punish the alleged contemnor immediately. App. 7a-9a.

REASONS FOR GRANTING THE WRIT

1. This Court has long recognized both "the importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt," and the fact that the failure of district judges to exercise such self-restraint implicates this Court's " 'supervisory authority over the administration of criminal justice in the federal courts.' " *Offutt v. United States*, 348 U.S. 11, 13 (1954) (citation omitted) (explaining basis for granting certiorari). The issues raised herein are extremely important because they involve crucial safeguards with respect to a district court's power to impose criminal punishment for contempt, without providing the defendant with such minimal due process rights as an opportunity to be heard with respect to the charges against him. Moreover, these safeguards on the use of summary contempt are particularly important when the alleged contemnor is an attorney zealously representing a criminal defendant:

> While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to

> present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.

In re McConnell, 370 U.S. 230, 236 (1962). Indeed, the failure to adhere to the required safeguards with respect to the imposition of summary criminal contempt under these circumstances implicates not only the due process rights of the accused attorney under the Fifth Amendment, but—by chilling the attorney's zealous advocacy on behalf of his client—adversely affects his client's Sixth Amendment right to effective assistance of counsel.

2. The court of appeals ruled that a trial court can summarily adjudge an attorney in criminal contempt and imprison him, thereby denying him an opportunity for a hearing on the charges against him, even when there has been no actual obstruction of justice. This holding is in conflict with decisions of this Court, as well as those of other Circuits.

This Court has made clear that "before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice." *In re McConnell,* 370 U.S. at 234. Other Circuits have likewise held that a trial judge may use the summary contempt power only when faced with an actual obstruction of justice. *In re Pilsbury,* 866 F.2d 22, 26 (2d Cir. 1989); *United States v. Turner,* 812 F.2d 1552, 1568 (11th Cir. 1987).

The reasons for this requirement were recently reiterated by this Court in *International Union, United Mine Workers v. Bagwell,* 114 S. Ct. 2552 (1994), decided after the court of appeals' decision herein. This Court noted that the contempt power "uniquely is 'liable to abuse.'" *Id.* at 2559 (citations omitted). "Contumacy 'often strikes at the most vulnerable and human qualities of a judge's temperament,' and its fusion of legislative,

executive, and judicial powers 'summons forth . . . the prospect of "the most tyrannical licentiousness." ' " *Id.* (citations omitted). These concerns, present even in the context of civil contempt, are particularly worrisome when the court summarily imposes a criminal contempt conviction. Thus, summary contempt proceedings may only be undertaken " 'to maintain order in the courtroom and the integrity of the trial process in the face of an "actual obstruction of justice." ' " *Id.* at 2560 (citations omitted). It is only then that the necessity for instant action in order to protect the administration of justice is so great, and the likelihood of an erroneous conviction so small, that "summary proceedings have been tolerated." *Id.*

In the instant case, Judge Harris summarily convicted Petitioner of contempt based on the "cumulative" impact of 16 separate incidents that took place during the course of the trial, most occurring days before Petitioner was held in contempt—and all following the issuance by the court of appeals of a writ of mandamus directed to Judge Harris, which had been sought by Petitioner. Petitioner was never given a hearing on any of the charges, including the one the trial court later characterized as the "straw that broke the camel's back." Petitioner therefore was denied the opportunity to demonstrate why conduct the trial judge included in the "bundle of straws" on which the finding of contempt rested amounted to legitimate advocacy, well within the parameters set by the trial court, and was in no sense contumacious nor intended as such.[5] Such an opportunity for counsel to be heard takes on particular importance in a case of "cumulative" contempt, where the removal of any of the "straws" from consideration might well lead to a different result when all are ultimately tallied—especially where, as here, what counsel

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[5] Indeed, it was only after the finding of contempt had been entered, sentence had been announced and, at the court's direction, served, that Mr. Levine, almost two weeks later, learned of the "bundle" of conduct upon which the order was predicated.

intended by his remarks bears directly on the contempt charge.[6]

Petitioner argued before the court of appeals that his conduct—both his actions occurring immediately prior to the summary contempt, and his actions days before that were also later cited in Judge Harris' written order—did not even cumulatively amount to contempt, let alone an actual obstruction of justice permitting a summary contempt conviction. The court of appeals sidestepped the obstruction of justice issue, stating that an obstruction of justice analysis would be relevant only to an alleged violation of 18 U.S.C. § 401(1), which has obstruction of the administration of justice as an element of the offense. App. 3a n.1. The "obstruction-of-justice inquiry" was thus irrelevant, the court of appeals reasoned, because Mr. Levine was convicted under 18 U.S.C. § 401(3). *Id.*[7]

The court of appeals' approach confuses the elements of the offenses set forth in § 401(1) and § 401(3) on the one hand, with the procedural requirements for the exercise of the summary contempt power on the other. Proof that the defendant "obstruct[ed] the administration of justice" is an element of the offense set forth in § 401(1) —whether a hearing is held or the defendant is summarily convicted. It is not an element of the offense set forth in

[6] The court of appeals, focusing only on the "final straw," affirmed the trial court's ruling on the grounds that "a reasonable fact-finder could adjudge" Mr. Levine's actions to be a willful violation of an unambiguous court order, App. 6a, and that the decision to use the summary contempt power was not an "abuse of discretion," App. 7a. Yet, it was not the "final straw" that was the focus of the written contempt order issued by the court below. Indeed, the trial court appeared to regard Petitioner's precipitating "final" remark as itself of little moment—but a "straw"; it was the so-called bundle of prior incidents which the court below found to have cumulatively amounted to contempt.

[7] In point of fact, Judge Harris never specified, in either his oral or written contempt order, which subsection Mr. Levine was convicted of having violated.

§ 401(3). Since *In re McConnell*, however, courts have imposed a procedural prerequisite to the exercise of the summary contempt power, even under § 401(3): only when there has been an actual obstruction of justice is the court's use of the summary contempt power permitted. In this context, the requirement of an actual obstruction of justice is not an element of the offense; it is, as this Court recently reiterated in *Bagwell*, a prerequisite to the exercise of the court's extraordinary power to convict an individual of criminal contempt without any opportunity to defend himself at a hearing.

The court of appeals' ruling thus eliminates an important procedural safeguard regarding the use of the summary contempt power. By eschewing the obstruction-of-justice analysis, the court of appeals was able to avoid the issue of whether Petitioner's conduct could have satisfied this procedural prerequisite. Such an analysis could only have led to the conclusion that the remark which the trial judge regarded as but "the proverbial straw" did not amount to an actual obstruction of justice, and thus did not justify summary action. Likewise, an examination of the prior "straws" cited by Judge Harris—many of which occurred a number of days before the contempt citation—would have demonstrated that no actual obstruction of justice was present, and that the use of the summary contempt power was thus improper. Because of the importance of this issue, and the conflict between the court of appeals' decision and the decisions of this Court and other Circuits, this Court should grant certiorari to review the propriety of the court of appeals' holding that no actual obstruction of justice need be present before the trial court's summary contempt power is invoked.

3. The court of appeals also ruled that a trial judge who acknowledges that he believes his integrity has been attacked by defense counsel can nevertheless convict the attorney of contempt and imprison him, without referring the case to a disinterested judge for a hearing. It is the first court to so hold, and its decision raises a very im-

portant question regarding the limits of a trial judge's power to punish summarily attorneys for perceived affronts to the trial judge.

The decision of the court of appeals in this case recognized the well-settled rule that, under normal circumstances, a trial judge is disqualified from ruling on a criminal contempt charge, and must refer the matter to another judge for a hearing, if the alleged contempt involved a purported attack on the judge's integrity, or other criticism of the trial judge. App. 8a. As the D.C. Circuit summarized the existing law on this issue in a recent decision (a decision relied on by the court of appeals herein): "The cases indeed bar the use of summary contempt procedures when alleged misconduct is of 'such a personal nature' as to create actual or likely 'embroilment' between the judge and alleged contemnor, or where 'the judge adopts an adversary posture with respect to the alleged contemnor, even if he has not been personally attacked.'" *In re Holloway*, 995 F.2d 1080, 1087 (D.C. Cir. 1993) (citation omitted), *cert. denied*, 114 S. Ct. 1537 (1994). It is likewise well settled in the D.C. Circuit (and we know of no contrary authority in other Circuits) that a "personal attack" requiring such recusal includes a perceived attack on the judge's impartiality or integrity. *United States v. Meyer*, 462 F.2d 827, 844-45 (D.C. Cir. 1972).

The basis for the rule requiring disqualification is that a trial judge who feels that his integrity has been attacked by the alleged contemnor might not have, or appear to have, the requisite impartiality when determining whether the alleged contemnor should be punished for the perceived affront. The rule normally applies whether or not the trial judge gives any outward signs of animosity toward the alleged contemnor, for two reasons: "First, personal animosity may in fact exist in a judge who is outwardly unperturbed; and, second, even if the judge possesses singularly charitable instincts and in fact entertains no personal feelings, the public might reasonably

suspect that such was not the case." *United States v. Meyer*, 462 F.2d at 839. Thus, where there is "an impugnation of the integrity and impartiality of the trial judge," *id.* at 845, it is "unlikely that the trial judge is a competent factfinder with respect to the alleged contempt; and it cannot be said, therefore, that a hearing would necessarily be a useless formality," *id.* at 840.

In the present case, it is beyond doubt that the trial judge would have been disqualified from presiding over a contempt hearing regarding Petitioner's conduct held after trial. Judge Harris' contempt order repeatedly acknowledges the fact that Judge Harris believed his integrity and impartiality to have been attacked, and cited these incidents as among the "straws" that ultimately led to the contempt finding. App. 23a, 27a-28a, 38a-40a. It should be noted that Petitioner's remarks were not of the nature attributed to them by the trial judge—Petitioner merely pointed out during bench conferences outside the hearing of the jury that the court's evidentiary rulings were almost invariably favoring the prosecution.[8] Yet what is important in this context is that Judge Harris *perceived* that he was under attack, whatever the true nature of Petitioner's remarks.[9] The court of appeals

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[8] Indeed, if a defense attorney believes that a trial judge's rulings are unfairly favoring the prosecution, it is his duty to state this on the record. As long as such remarks are made outside the hearing of the jury—as occurred here—they should not be the basis for a conviction for criminal contempt.

[9] The court of appeals indicated that it remained unconvinced Judge Harris was "personally upset" or otherwise biased toward Mr. Levine. App. 9a. Yet, Judge Harris acknowledges in his order that he regarded his integrity and reputation to be under attack by counsel. App. 23a, 27a-28a, 38a-40a. That perception, no matter how badly misplaced, cannot be ignored. Indeed, Judge Harris stated at one point in the trial that he was "dismayed by the extent to which counsel repeatedly are suggesting that my rulings are not fair," and warned counsel that "[i]f you all think that you are going to intimidate me by attempting to insult my integrity, you've got another thing coming." App. 66a.

did not dispute that, under such circumstances, Judge Harris would have been disqualified from adjudging Petitioner in contempt after trial. *See* App. 8a.

The court of appeals held in the present case, however, that because Judge Harris immediately held Petitioner in contempt—in the heat of the moment, and without an opportunity for Mr. Levine to defend himself—his failure to refer the matter to another judge for a hearing was proper. Thus, according to the court, the rule that would normally require disqualification due to the trial judge's personal involvement does not apply if the trial judge, rather than holding a hearing to determine whether the alleged contemnor is guilty, dispenses with a hearing entirely and instead immediately issues a summary contempt citation. The court of appeals justified this exception based on the "need to preserve order," which it said outweighed the interest of the alleged contemnor in receiving a hearing on the contempt charges before an unbiased judge. App. 8a. In place of the normal rule requiring disqualification when a judge perceived himself to have been insulted or criticized, the court of appeals established a far higher threshold: it would reverse summary contempt convictions only if, after a review of the record, it formed " 'a definite and firm conviction that the presiding judge harbored . . . bias towards the contemnor.' " *Id.* (citation omitted).

While this Court has not directly addressed the propriety of such a holding, it has given lower courts considerable guidance as to the requirement that a judge meting out punishment for contempt must be, and appear to be, impartial—especially when exercising the power to dispense with the normal requirements of due process and punish contempt summarily. The holding of the court of appeals in the present case is in conflict with the principles announced by this Court in this regard.

In *Offutt v. United States*, 348 U.S. at 14, this Court explained the necessity for recusal when a trial judge sought to punish counsel for a perceived affront:

> The [summary contempt power] entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer.[10]

In *Offutt*, the trial judge's lack of impartiality toward the alleged contemnor was manifest. However, this Court later made clear that overt hostility on the part of the trial judge was not a prerequisite to recusal when the judge believed himself to have been personally attacked by the contemnor. In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the trial judge demonstrated not hostility but great patience in the face of insults directed at him by a litigant. Nevertheless, this Court reasoned that a judge who has been personally attacked is not "likely to maintain that calm detachment necessary for fair adjudication," and therefore vacated the contempt citation and ordered a hearing before a disinterested judge, based on this presumption that the trial judge was likely to be biased. *Id.* at 465-66. This decision was applied by this Court later that term to vacate the summary contempt conviction of another litigant on the grounds that the trial judge who issued the citation had become, by virtue of his being named as one of the defendants in a separate civil rights action brought by the same litigant, "so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit." *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971) (per curiam).

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[10] *See also In re Little*, 404 U.S. 553, 555 (1972) (per curiam) (" 'Trial courts . . . must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.' ") (citation omitted).

Likewise, in *Taylor v. Hayes*, 418 U.S. 488 (1974), this Court underscored the importance of ensuring the impartiality of the trial judge when the summary contempt power is exercised. The Court noted at the outset the extraordinary and disfavored nature of the contempt power, given that " 'reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are "basic in our system of jurisprudence." ' " *Id.* at 498 (citations omitted). The Court also remarked that "[e]ven where summary punishment for contempt is imposed during trial, 'the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution.' " *Id.* (citation omitted).[11] Against this backdrop, *Taylor* not only reiterated the principle that a perceived personal attack on the trial judge disqualifies that judge from presiding over a hearing on the contempt charge, but held that, even in the absence of such an alleged attack, the judge is disqualified from ruling on the contempt when the judge is so embroiled in a controversy with the alleged contemnor that he cannot " 'hold the balance nice, clear and true between the State and the accused.' " *Id.* at 501 (citation omitted). " 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less." *Id.* (citation omitted).

Taylor thus sought to give individuals accused of criminal contempt far greater protection from the possibility of a biased tribunal than that provided by the recusal statutes

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[11] In a footnote, the Court quoted, *inter alia*, the following statement from the American Bar Association Advisory Committee on the Judge's Function: " 'Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court.' " *Id.* at 499 n.8 (citations omitted).

in ordinary criminal cases. Moreover, the Court in *Taylor* did not suggest that the rule disqualifying a judge who believed himself to have been personally attacked from passing judgment on his attacker was merely a prophylactic rule that could be easily disregarded; it was viewed as an important safeguard to the exercise of the contempt power.

The court of appeals implicitly distinguishes the foregoing decisions of this Court on the grounds that the trial judges whose contempt citations were at issue waited until after trial to impose a contempt conviction. A different and less stringent rule regarding disqualification should apply, the court of appeals reasoned, when an individual is held in contempt summarily *during* the course of the trial. In reaching this conclusion, the court relied on dicta in one of its earlier decisions for the proposition that use of the summary contempt power immediately after the misconduct occurred would "presumably" be permissible "even if the judge has evidenced personal embroilment or has been personally attacked." *United States v. Meyer*, 462 F.2d at 843. This dicta, which was based on the court's interpretation of *Mayberry*, turned on the timing of the summary contempt conviction: if the judge who had been personally attacked immediately held the transgressor in summary contempt, the judge's action was "presumably" permissible; but if he waited until later to hold the alleged contemnor in summary contempt, he was barred from exercising the summary contempt power and would have to refer the matter to another judge for a hearing.

The dicta relied on by the court of appeals was, however, implicitly rejected in *Sandstrom v. Butterworth*, 738 F.2d 1200 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985)—another decision on which the court of appeals chose to rely in the present case. In *Sandstrom*, an attorney was held summarily in contempt immediately after his alleged misconduct occurred. He argued that the judge

should have referred the case to another judge for a hearing, due to the trial judge's personal embroilment. The prosecution argued that the judge's personal embroilment was irrelevant when an individual is held summarily in contempt immediately after his misconduct occurred; under those circumstances, the prosecution asserted, the interest in preserving courtroom order takes precedence over the defendant's interest in an impartial tribunal. *Id.* at 1207-08. The court in *Sandstrom* rejected this view, noting that "a single-minded focus on authority and order to the necessary exclusion of due process serves neither value well." *Id.* at 1208. Moreover, the Eleventh Circuit reasoned, the rights of the alleged contemnor could not depend on the "notion of timing" urged by the prosecution: the argument that the crucial factor is whether the judge waits until after trial to adjudge the attorney in criminal contempt. *Id.* Thus, the contempt conviction at issue in *Sandstrom*—although summarily imposed immediately after the offending conduct—was properly reversed due to the judge's personal embroilment.

Although the contempt conviction in *Sandstrom* was reversed due to the trial judge's personal embroilment, there is dicta in that case to the effect that the *Mayberry* decision suggested that a higher level of proof of bias was needed when the judge acted immediately to punish summarily an alleged contemnor, and the fact that the judge believed himself to have been personally attacked was not sufficient to disqualify the judge if he acted immediately to impose a contempt conviction. 738 F.2d at 1212. The court of appeals in the present case seized upon this dicta, and used it as a basis for applying a less stringent standard for disqualification when there has been an immediate summary contempt citation, as opposed to a contempt determination made after trial. Such an approach, however, turns contempt jurisprudence on its head: a judge who would be disqualified from presiding over a hearing to determine the guilt of an alleged contemnor would nevertheless be permitted to dispense with a hearing en-

tirely and instantly convict the alleged contemnor despite the judge's presumed bias. Indeed, such reasoning results in the very evil identified in *Sandstrom*: by attempting to promote authority and order to the necessary exclusion of due process, the court of appeals serves neither value well.

The need for an unbiased tribunal is at its greatest in the context of an immediate and summary conviction for contempt. Under these circumstances, the alleged contemnor has virtually no due process protections at all, save the guarantee of a fair and impartial trier of fact. Thus, decisions that "bar the use of summary contempt procedures when alleged misconduct is of 'such a personal nature' as to create actual or likely 'embroilment,' " *In re Holloway*, 995 F.2d at 1087 (citation omitted), should not be ignored when an individual has been immediately convicted of contempt in the heat of a trial. Nor should the strict rule requiring disqualification when the judge believes himself to have been attacked or insulted be diluted under such circumstances. To the contrary, that is when the strict application of the disqualification rule is most critical.

The dangers inherent in the rule announced by the court of appeals are exemplified by the present case. The summary contempt finding here was precipitated by a remark of counsel that, in the trial judge's opinion, weighed lightly on the contempt scale, but was seen as significant for its "cumulative" effect as a "straw that broke the camel's back." The trial judge declined to hold a hearing, but instead immediately convicted and punished Mr. Levine, largely for incidents occurring days before—including perceived affronts to the judge. It was not until 12 days later that Petitioner even learned of the full set of charges for which he had been previously convicted and punished. Moreover, despite the judge's stated belief that he was under attack—which would normally require his recusal—the court of appeals upheld the conviction

because the appellate court did not have a "definite and firm conviction" that the judge was biased. It adopted this higher standard because of its concern for the need to enable the judge to maintain order in the courtroom. Yet, at the same time, the court of appeals purported to eliminate the requirement that there be an actual obstruction of justice before summary punishment may be imposed—thus considerably undercutting its stated justification for adopting its new standard. Finally, having permitted the trial judge to exercise the summary contempt power despite the judge's personal embroilment in the matter, the court of appeals applied deferential standards in reviewing the trial court's contempt findings.[12] In short, the convergence of the court of appeals' rulings prevented Mr. Levine from receiving the most rudimentary due process rights—and did so without requiring that there be the exigency of an actual obstruction of justice as a prerequisite to such deprivation. Given this Court's efforts both narrowly to circumscribe the trial judge's power to impose a contempt conviction without a hearing, and to ensure that the judge finding an individual in contempt is free from bias, the court of appeals' decision cannot be justified. Because of the importance of this issue to the Bar as a whole, and the fact that the court of appeals' ruling regarding the trial judge's failure to recuse himself conflicts with the principles announced by this Court, this Court should grant certiorari to review the court of appeals' decision.

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[12] The court upholds the trial court's finding on willfulness because "a reasonable fact-finder could adjudge" the evidence sufficient as to this element, and upholds the use of summary proceedings on the basis of "no abuse of discretion." App. 6a-7a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1994

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 92-3262

IN RE BARRY W. LEVINE

On Appeal from the United States District Court
for the District of Columbia

(Criminal No. 91-399)

Argued Feb. 7, 1994

Decided June 29, 1994

REHEARING AND SUGGESTION FOR REHEARING
IN BANC DENIED SEPT. 15, 1994

Before BUCKLEY, GINSBURG and HENDERSON, Circuit Judges.

Opinion for the court filed PER CURIAM.

PER CURIAM:

Appellant Barry W. Levine represented Leonard E. Briscoe in the district court in *United States v. Briscoe, et al.*, a multi-defendant criminal trial. On November 19, 1992, thirty-four days into trial, the trial judge summarily held Levine in contempt. While cross-examining a government witness, Levine stated aloud and in the presence of

the jury that the witness's testimony was changing. The judge immediately held Levine in contempt.

In his contempt order, the trial judge stated that Levine's conduct throughout the trial "cumulatively precipitated" the finding of contempt. While noting that he did not list all instances of Levine's misbehavior, the judge did cite examples of Levine's conduct during trial in the two weeks preceding the contempt finding. The examples constituted approximately thirty pages of the court's thirty-eight page order. *See* Joint Appendix (JA) at 1-38. Moreover, the order incorporated by reference the entire trial transcript and the judge emphasized that even the transcript could not "capture adequately the tone and behavior of Mr. Levine." *Id.* at 5.

Levine seeks a reversal of the contempt conviction on two grounds. First, he contends that the evidence was insufficient to support a finding of contempt. Second, he maintains that the trial judge became personally embroiled in the controversy and therefore Levine was entitled to a hearing before another judge. For the reasons set forth below, we affirm his contempt conviction.

I. Sufficiency of Evidence

Levine correctly observes that only the "least possible power adequate to the end proposed should be used in contempt cases." *In re Holloway,* 995 F.2d 1080, 1087 (D.C.Cir.1993) (internal quotation omitted), *cert. denied,* —— U.S. ——, 114 S.Ct. 1537, 128 L.Ed.2d 190 (1994). He fails to recognize, however, that when the presiding judge makes serious and repeated efforts to require a lawyer to abide by the judge's orders, it is difficult to discern "what lesser remedy [the judge] could reasonably have employed." *Id.* Thus, while contempt may be a severe remedy, it is appropriate in some cases. We believe this to be such a case.

The trial judge convicted Levine under 18 U.S.C. § 401; he did not, however, specify the subsection Levine

had violated. Nonetheless, because the judge found that Levine "continually defied the Court's explicit and direct orders," JA at 2, it is apparent that the judge applied subsection 401(3),[1] which provides that a court may punish as contempt "[d]isobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3). We recently enunciated the two elements necessary to make out a subsection 401(3) violation. First, the alleged contemnor must disobey or resist a "lawful writ, process, order, rule, decree, or command" of the court. *Holloway*, 995 F.2d at 1082 (quoting 18 U.S.C. § 401(3)). Second, the disobedience must be willful. *Id.* If "a fair-minded and reasonable trier of fact [could] accept the evidence as probative of [both of these elements] beyond a reasonable doubt," *id.*, we will affirm the conviction.

The conduct at issue involved Levine's attempt to admit into evidence a three-page audit certification letter, referred to as "Briscoe 46," during his cross-examination of a government witness. On the morning of November 19, during a bench conference, the court ruled the document inadmissible and refused to redact it. *See* JA at 31-32. Resuming the cross-examination, Levine asked the witness a series of questions related to Briscoe 46. The judge sustained the government's objection to one of the questions. *Id.* at 33-34. Levine pursued his questioning and again asked at a bench conference that he be allowed to introduce Briscoe 46. The judge again refused. *Id.* at 34-35. Immediately thereafter, Levine approached the witness and showed her Briscoe 46. The government again objected, Levine asserted that he wanted to use

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[1] Because we conclude that Levine was sanctioned under subsection 401(3), his arguments regarding subsection 401(1) are irrelevant. It is not necessary for us to find, as subsection 401(1) requires, that Levine's behavior actually "obstruct[ed] the administration of justice." 18 U.S.C. § 401(1); *see Holloway*, 995 F.2d at 1082 n. 1 (declaring obstruction-of-justice inquiry irrelevant to subsection 401(3) analysis).

Briscoe 46 to refresh the witness's memory and the court once more sustained the objection and told Levine to move on. *Id.* at 35. Nevertheless, Levine returned to the topic, asking whether an audit had been performed. After the government objected and the court iterated its ruling on the inadmissibility of Briscoe 46, Levine, in a "loud, argumentative tone," stated in front of the jury: "I want to get it straight, your Honor, because the witness is changing the testimony and I want to get it straight." The judge then summoned Levine to the bench, held him in contempt and sentenced him to four hours' incarceration that evening in the courthouse cellblock. *Id.* at 35-36.

Levine suggests that he did not disobey any lawful order of the court because the court's orders throughout the trial, and especially his ruling regarding the Briscoe 46 document, were unclear. We disagree. The court's ruling that Briscoe 46 was inadmissible, as well as his orders repeated throughout the trial not to argue to the jury in his examination of witnesses, were abundantly clear to put Levine on notice that his conduct was improper. "Whether an order is clear enough depends on the context in which it is issued and the audience to which it is addressed." *Holloway,* 995 F.2d at 1082. No one questions that the audience to whom the court addressed its order—Levine—was a trial lawyer of many years' experience. JA at 2. Moreover, the context in which the warnings and evidentiary rulings were made makes them unmistakable. The judge expressly and repeatedly ruled that Briscoe 46 was inadmissible and ordered Levine to pursue a different topic. *Id.* at 31-32, 33-34, 34-35, 35. The judge's admonitions included a specific contempt warning. *See id.* at 33. Moreover, on numerous occasions throughout the trial the judge admonished Levine not to argue to the jury and instructed him to request a side bar conference if he wished to argue an evidentiary matter. *See, e.g., id.* at 6, 16-17, 17. Given the numerous warnings, their specificity and their intended audience, we find Levine's vagueness argument unavailing.

Levine argues extensively the merits of the admissibility of Briscoe 46 and its importance. The court's ruling on the admissibility of evidence is not relevant to our contempt finding, however. If Levine disagreed with an evidentiary ruling, he was free to preserve the matter for appeal. *See Holloway*, 995 F.2d at 1088 (citing *Sacher v. United States*, 343 U.S. 1, 9, 72 S.Ct. 451, 455, 96 L.Ed. 717 (1952)). While we do not intend to chill a lawyer's efforts to advocate zealously for his client, we must ensure the court's authority to make the rulings necessary to the orderly and efficient administration of justice. *Cf.* Fed.R.Evid. 611(a) (empowering court to control mode and order of interrogating witnesses). When the court issues an order circumscribing a lawyer's conduct and informs him that failure to abide by its order will result in a contempt citation, the lawyer must cease the conduct or bear the consequences.

As to the second element of the subsection 401(3) violation—willfulness—we conclude that a fair-minded and reasonable trier of fact could find beyond a reasonable doubt that Levine acted willfully. "[W]illfulness may be inferred if a lawyer's conduct discloses a reckless disregard for his professional duty." *Holloway*, 995 F.2d at 1082 (internal quotations omitted); *see also United States v. Greyhound Corp.*, 508 F.2d 529, 531-32 (7th Cir. 1974) (willful intent is "a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful"). The cited conduct itself must be contumacious but "the analysis of intent properly encompasses the contemnor's behavior in related incidents such as disobedience or resistance to other orders of the court." *Holloway*, 995 F.2d at 1082. Here, the trial court could unquestionably conclude that the cited conduct was willful: the court repeatedly ruled Briscoe 46 inadmissible and ordered Levine to cease his questions regarding Briscoe 46 but Levine simply refused to comply. Levine intentionally circumvented the court's orders in order to

make the jury aware of a document the court had ruled inadmissible. His conduct recalls similar conduct we found contumacious in *Holloway*. There, the lawyer attempted to elicit testimony about a document the witness had not seen before. After the court warned him that the witness could not testify about a document he did not recognize, the appellant asked the witness: "Have you seen it now? Have you looked at it just now?" *Id.* at 1084. As we noted in *Holloway,* the appellant's "devious pretense that it would be enough if [the witness] saw the document in court that very day . . . points strongly in the direction of willfulness." *Id.* at 1085. Likewise, Levine's unrelieved efforts to elicit testimony regarding Briscoe 46 in the face of the court's repeated rulings denying admissibility manifest conduct that a reasonable fact-finder could adjudge as willful.

Additionally, the record is full of instances of Levine's disobedience or resistance to orders of the court. Despite the judge's warnings not to argue to the jury through questions, Levine persisted in doing so. *See* JA at 5-6. Levine attempted to put into evidence material the court had ruled inadmissible. *See id.* at 7-11. He frequently repeated questions to which an objection had already been sustained. *See id.* at 12-13, 16-17, 22, 25-26. Such wholesale disobedience is strong evidence of a pattern of willful disregard for the court's authority, disregard that cannot be fairly characterized as honest but aggressive lawyering.

Levine next argues that the trial judge improperly used the summary procedures of Federal Rule of Criminal Procedure 42(a) instead of the notice and hearing procedures of Rule 42(b) in holding him in contempt. Rule 42(a) permits a summary adjudication of criminal contempt "if the judge certifies that the judge saw or heard the conduct constituting contempt and that it was committed in the actual presence of the court." Fed.R.Crim. P. 42(a). Use of Rule 42(a)'s summary procedures is reviewed deferentially, for abuse of discretion. *See Holloway,* 995 F.2d at 1086; *United States v. Meyer,* 462 F.2d

827, 843 (D.C.Cir.1972). The trial judge certified that Levine's conduct was "committed in the actual presence of the court and was seen or heard by the court during the trial of this case." JA at 1. He also noted that summary procedures were necessary—given the length of the trial and the number of defendants and lawyers—"to preserve order and justice in the courtroom, to protect [the] Court's authority, and to prevent a mistrial." *Id.*

In *Holloway,* we approved summary contempt proceedings because the trial judge had warned the defendant to heed her rulings on pain of contempt; had repeated several times the threshold showing necessary to proceed with a particular line of questioning; and had warned the defendant that his continued inquiries violated the court's order. *Holloway,* 995 F.2d at 1087. The same factors appear here. The judge frequently warned Levine to heed his rulings and threatened him with contempt, *e.g.,* JA at 33; the judge told Levine that the witness could not testify about Briscoe 46, *id.* at 31; and the judge reminded Levine several times that he had already decided the inadmissibility of Briscoe 46. *Id.* at 32, 34. Despite his diligent efforts, none of his warnings to Levine worked—Levine continued to disregard the court's orders and evidentiary rulings. In our view, Levine's blatant disregard for the court's authority, thereby threatening its ability to ensure an orderly and fair trial, justified a summary finding of contempt; we therefore find no abuse of discretion.

II. Judge's Alleged Personal Involvement

Levine also argues that the hearing should have been referred to another district judge because the trial judge was "personally embroiled" in the controversy with Levine and adopted an "adversary posture with respect to [him]." *See United States v. Meyer,* 462 F.2d 827, 841 (D.C.Cir. 1972). During at least three bench conferences Levine suggested that the court was favoring the government in

its evidentiary rulings, *see* JA at 11-12, 14, 22; in its contempt order the district court interpreted these comments as an accusation of bias. *See id.* at 11, 14. Although Levine questioned the trial judge's impartiality, there is nothing in the record indicating any bias or partiality on the trial judge's part; on the contrary, the record manifests an extremely patient district judge ultimately driven to use his contempt power. In any event, our decision in *Meyer* distinguishes between a contempt citation issued *after* trial and one issued summarily under Rule 42(a) *during* trial; a citation issued after trial can trigger the judge's recusal if the judge's integrity is attacked or if the contempt charged otherwise "involves disrespect to or criticism of" the judge. Fed.R.Crim.P. 42(b). As *Meyer* stated, however, the situation is different if the contempt occurs during trial:

> [I]t is clear that if the trial judge deems summary conviction necessary to preserve order . . . summary conviction is proper. *And this is presumably true even if the judge has evidenced personal embroilment or has ben personally attacked.* . . . [T]he need to preserve order, by itself, not only supports summary disposition, but also outweighs the possibility of bias on the part of the trial judge.

Meyer, 462 F.2d at 843 (emphasis added); *see also Sandstrom v. Butterworth*, 738 F.2d 1200, 1212-13 (11th Cir.1984) (noting, in dicta, that "when bias is presumed soley from the contemnor's personal attacks on the judge, this potential bias does not overcome the need for judicial authority to maintain courtroom order") (internal quotation omitted), *cert. denied*, 469 U.S. 1109, 105 S.Ct. 787, 83 L.Ed.2d 781 (1985). We do not mean to suggest that a showing of bias may never suffice to overturn a Rule 42(a) contempt citation. As *Sandstrom* noted, "[i]f after examining the record, the reviewing court forms a definite and firm conviction that the presiding judge harbored . . . bias towards the contemnor [that would prevent the fair

administration of justice], the contempt citations must be overturned." *Sandstrom*, 738 F.2d at 1214. Nothing in this record, however, indicates that the judge was personally upset by or indeed anything but patient with Levine. Therefore, the necessity to discipline Levine in order to conduct an orderly trial outweighs any potential bias resulting from the lawyer's criticism of the court.

All of the events necessary to establish contempt occurred in this case. Levine disobeyed the court's orders, the orders were clear and unequivocal and Levine acted willfully. Because the district judge witnessed the contumacious acts, and because he repeatedly warned Levine of the possibility of contempt, he was justified in adjudging Levine's contempt summarily. Finally, the judge was not personally embroiled in the matter nor did he adopt an adversary posture with respect to Levine. Accordingly, the conviction is

Affirmed.

[Filed Dec. 1, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 91-399 SSH and 92-86 SSH

UNITED STATES

v.

LEONARD E. BRISCOE, LANCE H. WILSON, and
MAURICE DAVID STEIER

RULE 42(a) ORDER OF CONTEMPT

In conformity with Fed. R. Crim. P. 42(a), the undersigned hereby certifies that the conduct of Barry M. Levine, counsel for defendant Briscoe, as is set forth partially below, was committed in the actual presence of the Court and was seen or heard by the Court during the trial of this case, which began on September 29, 1992, and, as of the date of this Order, is still proceeding. Such conduct constituted criminal contempt.

The Court recognizes that summary disposition under Rule 42(a) is an extraordinary power that must be reserved for "exceptional circumstances." *Harris v. United States,* 86 S. Ct. 352, 354-55 (1965). A court may invoke Rule 42(a) only when there has been an "actual obstruction of justice." *In re McConnell,* 82 S. Ct. 1288, 1291 (1962). Moreover, there must be a compelling need for an immediate remedy or time must be of the essence. *United States v. Lowery,* 733 F.2d 441, 447 (7th Cir. 1984) (citing *United States v. Mochiano,* 695 F.2d 236, 251 (7th Cir. 1982)). The Court had hoped that

such an extraordinary sanction could be avoided in this case. Reluctantly, however, the Court found that despite its repeated attempts to persuade Mr. Levine to comply with its rulings, it had no option but to hold Mr. Levine in contempt.[1]

As set forth below, Mr. Levine continually defied the Court's explicit and direct orders. The Court warned Mr. Levine repeatedly that he was, and is, required to adhere to the Court's orders. The Court further warned Mr. Levine repeatedly that should he continue blatantly to disregard the Court's rulings, he risked being held in contempt. Mr. Levine failed to heed these warnings and continued in his defiance of the Court. The Court finds that Mr. Levine's conduct obstructed the administration of justice. *See Pennsylvania v. International Union of Operating Engineers,* 552 F.2d 498, 509 (3d Cir.), *cert. denied, Freedman v. Higginbotham,* 434 U.S. 822 (1977) ("flouting a trial judge's commands is the essence of obstructing the administration of justice"); *see also Lowery,* 733 F.2d at 445; *In re Gustafon,* 650 F.2d 1017, 1020 (9th Cir. 1981).

The Court finds that Mr. Levine's conduct was willful. Mr. Levine has many years of experience as a trial attorney, including experience as an Assistant United States Attorney. The Court gave numerous, unequivocal warnings that persistence in his course of conduct would result in a finding of contempt. Moreover, Mr. Levine

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[1] The Court dispels any notion that its decision is affected by prior proceedings in a separate matter involving defendant Briscoe. The Court does note that in *United States v. Briscoe and Gunter,* Cr. No. 92-85, Mr. Levine, on behalf of defendant Briscoe, did seek and was granted a writ of mandamus against this Court. *See In re Leonard E. Briscoe,* No. 92-3202, 1992 U.S. App. LEXIS 27849 (D.C. Cir. Oct. 27, 1992) (holding that this Court did not have power under Fed. R. Crim. P. 21(b) to transfer that case back to the Southern District of Florida, where the indictment had been returned).

should be aware of the well-established obligation of a trial attorney to obey all orders of the Court, even those that he may feel are incorrect. *See Maness v. Meyers*, 95 S. Ct. 584, 591 (1975) ("Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect."). Because Mr. Levine should have been aware that his conduct was wrongful, the Court infers that it was willful.

The Court further finds that summary procedures are necessary in this case, in which there are three defendants and ten attorneys.[2] The Court held Mr. Levine in contempt as a last resort; no method short of contempt has been successful thus far. Unless the Court took a significant, immediate step to deter the misconduct of Mr. Levine, this already protracted and extraordinarily unpleasant trial, which is now entering its ninth week, risks becoming unmanageable; the Court concluded that Mr. Levine would continue to defy the Court as long as no sanctions were imposed. This Order is necessary to preserve order and justice in the courtroom, to protect this Court's authority, and to prevent a mistrial.

The Court sets forth below specific examples of Mr. Levine's conduct that cumulatively precipitated the finding of criminal contempt. The Court cannot feasibly list every one of the numerous instances of Mr. Levine's misconduct, but instead lists only selected instances from the two weeks of trial immediately preceding the conduct

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[2] Two indictments are consolidated for trial—one returned by the Office of Independent Counsel here in the District of Columbia, and the other returned by the United States Attorney for the Southern District of Florida (with the latter having been transferred here on a written motion filed by Mr. Levine on behalf of defendant Briscoe). Thus, attorney participants are three Associate Independent Counsel, one Assistant United States Attorney (from the Southern District of Florida), and six defense counsel.

that directly lead to this contempt citation.[3] In particular, the Court lists those instances in which Mr. Levine persisted in a course of conduct in defiance of a previous ruling of the Court.

In addition, the Court recites occasions where Mr. Levine has ignored the established rules of this courtroom. During the Court's pretrial conference off the record, the Court set forth its standard courtroom procedures. It instructed the parties, as it does in every case, not to argue objections from the well of the court. The Court believes that, among other reasons, such arguments are more often aimed at influencing the jury, rather than designed for aiding the Court. It also instructed the parties that if the nature of an objection was not apparent from the context, the Court would call counsel to a side bar discussion for an explanation of the objection. *See* Fed. R. Evid. 103. Moreover, the parties were instructed that if they did not understand the basis for an objection or a ruling, or if they wished to be heard on the objection, they could request to approach for an explanation and/or to put their positions on the record. Throughout these proceedings, the Court freely has allowed the parties to put their positions on the record. Nevertheless, as the following excerpts show, Mr. Levine repeatedly failed to follow these procedures.

Because isolated quotations from a transcript can give only a partial view of Mr. Levine's conduct, the Court incorporates the entire record by reference as part of these proceedings.[4] The Court also notes the obvious: a written transcript cannot capture adequately the tone and behavior of Mr. Levine.

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[3] Selections from the transcript are reprinted as is, without corrections for grammatical and typographical errors. However, whenever the name of a participant is set forth for the first time, his or her role is mentioned in brackets.

[4] Due to the nature of this Order, the Court necessarily lists instances of egregious misconduct. Thus, in all of the situations

I.

On November 9, during his cross-examination of Mr. Dixon, Mr. Levine made arguments to the jury in the guise of cross-examination, and badgered the witness:

> Mr. Levine: So what you did was, you did the simple mathematical calculation. He paid 3 million. He got a loan of 4.2 million. The difference between the two is 1.2 million and he kept the 1.2 million as profit; is that correct, sir?
>
> A: Yes, sir.
>
> Mr. Levine: And that is what you told this jury last week and this week; isn't that correct, sir?
>
> A: Yes, sir.
>
> Mr. Levine: Now, sir, isn't that ridiculous?
>
> Mr. Gelber [AUSA; S.D. Fla.]: Objection.
>
> The Court: Objection—
>
> Mr. Levine: Isn't what you told this jury on its face ridiculous?
>
> Mr. Gelber: Objection, your Honor.
>
> The Court: The objection is sustained.
>
> . . . .
>
> Mr. Levine: So the proposition that he put the difference between the purchase price, $3 million and 4.2 in his pocket is on its face just ridiculous; isn't that true?

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recounted, the Court has ruled against Mr. Levine. Although the Court has not always ruled against Mr. Levine (or his co-counsel), such rulings have occurred frequently. The Court feels that this is due not only to the lack of merit of his objections, but also due to a concerted defense strategy. The Court believes that the defense frequently has advanced meritless positions in an effort to portray this Court as ruling too often in favor of the government.

Mr. Gelber: Objection, your Honor.

The Court: The objection is sustained.

Mr. Levine: As a matter of fact, you don't know what he did with that $1.2 million, do you? You don't know if he put it into the land; isn't that correct?

A: He didn't put it into the land. I am pretty positive about that.

Mr. Levine: You are pretty positive about that? You are pretty positive about this transaction, aren't you?

Mr. Gelber: Objection your Honor.

The Court: The objection is sustained.

Mr. Gelber: Your Honor, may we go to side bar?

The Court: Yes, sir.

(At the side bar.)

Mr. Gelber: Judge, I don't object so much as to the substance. I objected twice. He asked earlier whether it was ridiculous. I believe you sustained it and then he went back and asked the question. Now he is engaging in banter with the witness. I have no problem with doing valid impeachment, if he has a basis to do it. I object to counsel merely asking questions which are so emotionally charged, argumentative and only are going to be sustained, that he is attempting to argue through the questions which he is continually doing. That is my objection.

Mr. Levine: Your Honor, what the prosecution doesn't know about this loan is, in a word, appalling.

The Court: You haven't attempted to follow up with some degree of rationality and order.

Mr. Levine: I would like to do it my way, not his way. He put this misinformation in front of this jury. I intend to correct it, and if everybody pays

attention very quickly they will learn what kind of appalling proposition the government advanced. Right now I'm there.

The Court: Don't argue with the witness. Ask him questions. Develop them in a way that you well know how to develop properly.

Mr. Levine: I do. The question that brought us to side bar was this question. You are pretty positive about this loan, aren't you. I want the answer to that question.

Mr. Gelber: Well, actually, Your Honor, that is an incredible question. Pretty positive about what? He is throwing out argumentative things with the question. . . .

. . . He can talk like a lawyer, not attempt to argue to the jury his questions. He shouldn't have leeway to scream.

The Court: I agree.

Mr. Levine: I will move along quickly, your Honor.

The Court: Without screaming, please.

(Tr. 5910-5915).

II.

Later that afternoon, Mr. Levine attempted to get an exhibit into evidence through a witness who had stated on the stand that he had never seen the exhibit:

Mr. Levine: I show you what has been marked as Defendant's 27, 28, and 29, Briscoe documents. 27 first. Is that not, sir, the closing statement for a—

Mr. Gelber: Objection, your Honor.

The Court: The objection is sustained.

Mr. Levine: Do you recognize government—excuse me, Briscoe 27 for identification?

A: No, sir, I don't.

Mr. Levine: You have never seen it before?

A: I didn't say that. I just don't recognize it.

Mr. Levine: Take your time and look at it.

. . . .

A: I just don't recall seeing this.

Mr. Levine: Describe it, please.

Mr. Gelber: Objection, your Honor.

Mr. Levine: What is it?

The Court: The objection is sustained.

Mr. Levine: I show you what has been marked as government's number—excuse me Briscoe 28 for identification. What's that called?

A: It is entitled "Closing Agreement."

Mr. Levine: What—who are the parties.

Mr. Gelber: Objection, your Honor.

The Court: The objection is sustained.

Mr. Levine: Look it over. Tell us if you have seen it before.

(Pause.)

Mr. Levine: Do you recognize that, sir?

A: No, sir. I'm sorry. I don't.

Mr. Levine: I show you now what has been marked as Briscoe Exhibit Number 29 for identification. Do you recognize that?

A: I don't recall this as a contract that I have seen. I may have. I just don't recall, sir.

Mr. Levine: You just don't recall. All right.

Well, do any of these documents, 27, 28 or 29, Briscoe documents, refresh your recollection that the purchase price was—

Mr. Gelber: Objection, your Honor.

The Court: Mr. Levine, we will excuse the jury for lunch.

After the break, the Court heard discussion on this issue outside the presence of the jury. The Court ruled that this line of questioning should not be continued.

Mr. Levine: Your Honor . . . I would like to complete the cross-examination, at least for the time being, and then make some decisions as to whether or not we would want this witness to be held over or not, and I will just have to make that judgment, at least for Mr. Briscoe, when we complete the cross-examination.

The Court: Well, you say complete the cross-examination. You keep ignoring . . . my rulings and the rules of evidence. You keep wanting to get evidence in through your testimony through a witness who hasn't seen documents that you have shown him. If that's your idea of cross-examination that you want to go through, I think we ought to talk about it before we bring the jury back in.

Mr. Levine: Your Honor, I have, I think, a considerable amount of experience—

The Court: There is no question about that which is what surprises me about the number of times this has happened.

Mr. Levine: Your Honor, I think I am following the rules. I surely promise the Court that I endeavor to follow the rules. If my performance is not flawless, I ask for forgiveness. I think that the govern-

ment has called a series of witnesses who are remarkable for what they do not know. . . .

Now, they draw from these witnesses, with the Court's permission and over our objection, the speculation of these witnesses. What I want to do on cross is to establish that they have no knowledge, but, rather, they are speculating, and I think I can do that, and I think I am doing that within the rule. . . . .

Now, I know, because I have obtained it from the closing files Briscoe Exhibits 27, 28 and 29 which directly refute this witness' testimony. I know that. I have it in my hand. I've shown it to the Court. I have given copies to the government and I have shown it to the witness. This witness said that this land was sold for $3 million. That is dead wrong. He is either lying or woefully misinformed.

Now, we can dance about the rules any way this Court wants, but the fact is that what this jury has been told is wrong. That's the fact. The closing file belies that testimony, and the government has objected and the Court has sustained the government's objection with us telling the jury a fact that is irrefutable. This land was bought for $4.2 million and the money went to the seller. That is what happened.

The Court: Do you understand you are not a witness in this case, Mr. Levine?

Mr. Levine: Your Honor, I have the documents. This is a witness in the case, and if I were given an opportunity to cross-examine this witness within the rules I could establish that fact. . . .

The Court: What rule are you relying on for your introduction of evidence that the witness doesn't know about it?

Mr. Levine: This is part of Frontier's files, your Honor. This witness put in documents from Frontier's files. This is part of its files.

. . . .

The Court: You did ask the witness if he had seen these, and he said no, and then you have a proper mechanism for introducing this one whenever—

Mr. Levine: Your Honor, I put it to the witness. The witness said no. How have I violated the rule by putting it to the witness and asking him questions about it? You know, what is shocking to me, your Honor, what's shocking and, frankly, appalling is that the government doesn't share my zeal to find out what happened. That's shocking. This is what happened, but they want us all to live myopically and not see what is the truth.

The Court: Evidence comes in one piece at a time, Mr. Levine. You know that. One witness doesn't know everything that happened in a case. If they did we would have one witness on one side and one witness on the other.

Mr. Levine continued to argue to the Court that his questioning of the witness was proper.

The Court: Well, let's proceed, but I have tried to keep my admonitions and request, Mr. Levine, at the bench, at side bar, and I may have to caution the jury that what you are doing is in contravention of my rulings and I may have to refer this case, do some other action, whether it is contempt or referring it for discipline. We will just see. I don't know, but my rulings seem to be just uniformly violated by you as we go.

Mr. Levine: I regret that your Honor has made that observation. Your Honor, I can tell this Court I have never intended to violate a single ruling or the spirit of that ruling. This case has been made

very difficult for us, Your Honor. The government has sought and has obtained all kinds of restrictions on our ability to defend ourselves including the first order just before trial about limitations on issues that were relevant to this defense.

I am trying to discharge my duty to the client as required by the canons, and I am trying to discharge my duty to the Court as its officer.

The Court: There may well be a legitimate difference of opinion with respect to that. We will see what happens, but I would hope that—you are a very experienced trial counsel and I would hope that you would conduct yourself the way you are supposed to.

Mr. Levine continued to question the witness. After approximately 12 transcript pages of questioning, Mr. Levine returned to the documents that the Court had just ruled were inadmissible through this witness.

Mr. Levine: Again, I show you what was marked—

Mr. Gelber: Objection, your Honor.

Mr. Levine: May I finish the question?

The Court: Could we talk for a second, please.

(At the side bar.)

Mr. Levine: I have in front of me Briscoe Exhibits 27, 28, and 29. Does your Honor have a copy of it?

The Court: Yes.

Mr. Levine: 27 shows that at the closing—

Mr. Gelber: Your Honor, if he could speak a little lower. He is very loud, and he tried once to get it in. He is trying again, and I don't want him to get it in through side bar.

Mr. Levine: Maybe Mr. Gelber wants to try the case from both sides of the room. It shows—it shows

$4,184,184.98. That is approximately $4.2 million. That is the price for the 22 acres. That is it, and this has attached to it, your Honor,—

The Court: We have covered all this.

Mr. Levine: No, we haven't. . . . Now I am going to ask him if it refreshes his recollection . . . Now, why can't I do that?

. . . .

Mr. Levine: . . . [The document] rebuts the $3 million and the 1.2 in the pocket. It does that, and that is the truth, and anything we do—to keep this from the jury is to hide then from the truth.

The Court: I am not saying that you can't get it before the jury. The witness says he doesn't know about it.

. . . .

The Court: The objection is sustained. Let's move on, Mr. Levine.

Mr. Levine: Has your Honor ruled that I cannot show him the document?

The Court: Yes, sir.

Mr. Levine: That was to authenticate. Now I want to refresh his recollection. That is the linguini issue.[5] Now I want to use it for a different purpose. I want to see if it refreshes his recollection. It is a different purpose. Before I wanted to lay a foundation to get it admitted into evidence. Now I want to refresh his recollection.

Mr. Gelber: Judge, I have all the same objections I made before. This invites—

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[5] The term "linguini" has become somewhat of an abbreviated and light-hearted way of referring to the device of seeing whether a witness's recollection may be refreshed by reference to a document.

Mr. Levine: I won't mention the content of the document.

The Court: Let's just move on.

(Tr. 5919-5958).

III.

During the afternoon session of November 12, at a side bar, Mr. Levine accused the Court of bias and lack of integrity:

Mr. Levine: . . . The government comes up here with a grin, because they are comfortable with what this Court is going to do.

The Court: I truly wish you would stop making statements like that, Mr. Levine. I don't know whether your intention is to seek to make me get cross with you—

Mr. Levine: Of course not.

The Court: —or try to make the record look as though you are being picked on unmercifully. I don't know why you keep making comments like that. I take one evidentiary—make one evidentiary ruling after another. If I happen to think you are right, I rule in your favor. If I happen to think you are wrong, I rule against you.

Mr. Levine: My observation is in close to eight weeks, anything we have brought up, we have lost.

The Court: You have not made very good objections.

Mr. Levine: Nor very good motions, because we have lost every single thing.

The Court: You are perfectly entitled to make a record if you want . . . .

(Tr. 6404-6405).

IV.

During the morning session of November 13, during Mr. Levine's cross-examination of the government's witness Mr. Kisteneff, the following exchange took place:

Mr. Levine: On Monday afternoon I introduced myself to you; isn't that correct, sir?

A: Yes, sir.

. . . .

Mr. Levine: Now, I encountered you again, did I not, on Tuesday morning, isn't that correct, sir?

A: That is also correct.

Mr. Levine: That occurred when you were coming into the courthouse; isn't that correct?

A: Yes, sir.

Mr. Levine: You were in the company of Mr. Roscoe Howard [Associate Independent Counsel]; isn't that correct?

A: Yes, sir.

Mr. Levine: And I asked you if I could spend 10 minutes with you to discuss this case, do you recall that?

A: Yes, sir.

Ms. Smith [Associate Independent Counsel]: Objection, your Honor.

The Court: Could we talk at the side bar for a moment, please?

(At the side bar.)

Ms. Smith: I find this very irrelevant and he is trying to embarrass this man and the tone of voice concerns me.

Mr. Levine: I have nothing to say to that absurd objection and I would like to move on.

The Court: The objection is sustained.

Mr. Levine: On tone? It is an aggressive tone and designed to be aggressive, and I intend to make this witness feel quite uncomfortable during the next hour of his life.

The Court: The objection is sustained. This is totally irrelevant.

Ms. Rogers [co-counsel for defendant Wilson]: No, no—

Mr. Levine: Please, would you stop—

Mr. Wells [lead counsel for defendant Wilson]: Excuse me, your Honor. He refused to talk to us. . . . the fact that he refused to talk to us is certainly something that shows bias.

The Court: I am not sure that shows bias at all. . . . Let's get to the facts of what the case is about.

Defense counsel continued to argue that the witness's failure to talk to them showed bias. The Court reiterated that the objection was sustained. Mr. Levine continued his questioning.

Mr. Levine: We never did have that conversation did we, Mr. Kisteneff?

Ms. Smith: Objection, your honor. Can we go to side bar, please?

(At side bar.)

Ms. Smith: Your Honor, you just instructed him not to get into that.

The Court: Yes, maybe you didn't understand me, Mr. Levine.

Mr. Levine: I changed the question, your Honor. It was a different question.

The Court: Well, the first question you asked was on the line that I just basically sustained an objection to. You asked it again—

Mr. Levine: No, I didn't ask it again. I asked a different question.

The Court: Where are you going now?

Mr. Levine: Is the Court going to require me to make a proffer?

The Court: The unfortunate thing I have learned through you, Mr. Levine, is that you seek to testify throughout your cross-examination. You seek to get in evidence that is not properly presented through your questions—

Mr. Levine: This witness said yes.

The Court: I am sorry, please let me—do you interrupt all judges or am I the only one?

Mr. Levine: I apologize for that, your Honor.

The Court: That is the problem I have is that you keep bringing in things that are inappropriate.

Mr. Levine: Your Honor, bias and prejudice are relevant issues for cross-examination.

The Court: Of course they are.

Mr. Levine: We believe, and if this Court would give me a shred of latitude, I would develop bias and prejudice. Cutting us off after a few questions you are not enabling me to develop what is perfectly proper cross-examination.

The Court: Bias and prejudice is perfectly proper, but this does not show bias and prejudice.

. . . .

Mr. Gelber: When you sustain the objection, they should stay away from it and I assume he has to get the question to get in another area and he should follow the Court's order. When you tell us not to do something, we are not going to sneak it in. Asking a question he knows is outside the area is something you told them not to do. This happened before and I know it is going to continue and we will continue to abide by the rules, your Honor, but every time we are going to come here and seek the—I don't know what the Court can do actually because apparently—

The Court: As I have told Mr. Levine before, it may be necessary to have a contempt citation.

Mr. Levine: Your Honor, those kind of observations I regard as just chilling the defense. I am doing my best.

The Court: It is not chilling the defense. It is trying to be honest with an attorney who repeatedly has disregard for the Court, repeatedly criticizes the Court, talks contemptuously to the Court and insults the prosecution. There has to be some limit in which an attorney—

Mr. Levine: There are standards and I know the standards—

The Court: I think you do, too, and you should look up to them, but I don't want to get off on this.

(Tr. 6549-6556).

V.

Later that afternoon, during a discussion about the admissibility of certain newspaper articles, Mr. Levine again accused the Court of bias:

The Court: I am having trouble, of course, by trying this case with the newspaper articles.

Mr. Levine: Most of the government's case came in through hearsay or through witnesses who were able to testify as to what others told them or other things they have seen. If this were a government putting in a business record, it would come in.

The Court: As usual, Mr. Levine, I don't accept your characterization of the evidentiary ruling that were made in the case.

(Tr. 6612).

VI.

Later that afternoon, Mr. Levine read from a document that was not in evidence and asked the witness:

Mr. Levine: Isn't it true, sir, you told Mr. Smith that it was irrelevant whether the accusations were true or false? Isn't that true?

A: I haven't read that letter in years, but if you are quoting from a letter, it is true.

Mr. Levine: Isn't it true you said that—you told Mr. Smith that the effect had been through HUD's arbitrary and capricious administration of the UDAG that it was bringing this project to the brink?

A: Is that a quote?

Ms. Smith: Your Honor, I don't know what he is reading from.

. . . .

The Court: Could we have a talk for just a minute, please?

(At the side bar.)

The Court: Yes, sir, what are you reading from?

Mr. Levine: What am I reading from?

The Court: You were the one who was reading.

Mr. Levine: I thought there was an objection.

The Court: She said she doesn't know what you are reading from and we are asking what it is you are reading from.

Mr. Levine: It is the letter that this witness acknowledged he wrote.

Ms. Smith: I just don't believe it is in evidence. I don't recall what you are referring to.

. . . .

The Court: . . . Are you reading from 140?

Mr. Levine: No, no, no.

The Court: Could you help me understanding what you are doing?

. . . .

Mr. Levine: . . . [I]t is a letter dated January 19, 1990 to Tony Smith at West Palm Beach, pertains to the Belle Glade project, I can proffer that and it is written by Mr. Kisteneff as president of Kisteneff Capital Corporation, and it is his letter with his proposal with respect to this deal and that is what I was talking about.

The Court: But you are reading from the document that is not in evidence which I gather is your concern.

. . . .

The Court: I don't have the slightest question that he is reading from something which is not in evidence which Mr. Levine has done repeatedly in the case.

Mr. Levine: Your Honor, I am allowed to ask the witness if he said some things and I can either paraphrase them or read them and ask if he said them to Mr. Smith. All I need is a good faith basis to make the inquiry. That is all I need. I have that.

The Court: You certainly can make the inquiry, but I am troubled by, and what the government's concern is, reading from something that is not in evidence when you clearly are just reading it for the record.

Mr. Levine: I am asking the witness if he remembers it. I don't want to put it in front of him right now. . . . I want to show he doesn't know some of these things. I want to do it my way. I don't want to do it Ms. Smith's way. I don't have to do it her way under the rules of evidence. If he says no, then I can confront him with the document. I don't want to show it to him so he says yes.

The Court: If all you are trying to do is trick the witness by reading lengthy statements which he has no—

Mr. Levine: Your Honor, I asked one—these are not lengthy, they are short.

The Court: We are never going to finish this case.

Mr. Levine: I didn't bring us here.

The Court: Please do not read the exhibit. Ask him if he said something. You are certainly entitled to do that. Let's not read something that is not in evidence to the jury.

(Tr. 6636-6641).

VII.

Later that afternoon, Mr. Levine concluded his cross-examination of the witness Kisteneff by, in effect, making an improper argument to the jury:

Mr. Levine: [Mr. Briscoe] wasn't going to let HUD force him out, was he, sir?

A: You must ask that to Mr. Briscoe.

Mr. Levine: He had too much pride and too much principle and he didn't care about the money; isn't that true, sir?

Ms. Smith: Objection.

The Court: The objection is sustained.

Mr. Levine: He wanted to build Belle Glade for those people who desperately needed it, didn't he, sir?

Ms. Smith: Objection.

The Court: Mr. Levine, I have said several times, please limit yourself to questions properly phrase.

Mr. Levine: And you wanted the fee and your reputation; isn't that correct, sir?

A: No, sir.

Mr. Levine: And you on the one hand threatened him with criminal prosecution and on the other hand just days later wanted to do business with him; isn't that correct, sir?

Ms. Smith: Objection.

The Court: The objection is sustained.

Mr. Levine: It is pay back time, isn't it, Mr. Kisteneff?

Ms. Smith: Objection.

The Court: That wasn't even a question, as I understand it.

Mr. Levine: It was a question.

The Court: The jury is instructed to disregard it.

(Tr. 6721-6722).

VIII.

During the morning session of November 16, the Court made the following observations in open court before the jury was brought in:

> The Court: Now, I don't know how this case has gotten into the unfortunate atmosphere, for want of a better word, that it has gotten into. The administration of justice counts a great deal on the professionalism, ethical standards, whatever you want to call it, of the lawyers who are before the court. We, frankly, don't have very good mechanism for trying to deal with it when we have time wasted or conduct which is questionable. During the cross-examination by Mr. Levine of Mr. Kisteneff on Friday afternoon, I thought to myself how long is this going to go on, and then I thought well, if past is prologue, what will happen is Mr. Levine will finish his cross-examination and then he will make two "questions," which in effect are mini arguments which he knows to be objectionable, and that is how we will close, and sure enough that is what happened.
>
> . . . .
>
> If anybody thinks I have committed reversible error, that is their thought, but that is not up to either counsel or this court to decide. I think basically there seems to be an atmosphere intended to try to intimidate me to rule in a particular way and I will neither be intimidated nor over react. I am not angered by anything that happens, although I am disappointed by counsel's conduct, I am disappointed by the repeated insults and attacks on government counsel.
>
> We are all here to do a job and this job is not pleasant for any of us. Looks like we are just going to have nothing but problems with this particular witness, but I make, once again, a plea for proper, vigorous, but ethical and professional representation

of the parties to this case, and I will direct you, Mr. Levine, when you finish your cross-examination of a witness and are through with your questions, stop. Don't make mini arguments. You will have an opportunity for argument at the close of the case.

(Tr. 6809-6812).

IX.

During the morning session of November 17, while Mr. Gelber was questioning Ms. Abbamonte, Mr. Levine attempted to make an argument in open court:

Mr. Gelber: Approximately how much a month did it pay in American Express bills?

Mr. Levine: Objection, your Honor.

The Court: The objection is overruled.

A: I think—

Mr. Levine: Your Honor, what if they are business expenses?

The Court: Could we talk at side bar for just a second, please.

(At the side bar.)

The Court: Yes, sir.

Mr. Levine: Your Honor, Mr. Briscoe, as Mr. Gelber knows and as the Court knows, lives in Fort Worth, Texas. That is his home . . . .

Now, his lodging if he was in a hotel, that would be a business expense. The fact that he is in a condo because he has to be there longer is also a business expense. That Mr. Gelber lets her say that is a personal expense is perverse. It is not true. It is perverse. It is distortion. It is corruptly adduced evidence. It is a fraud on this jury.

. . . .

Your Honor, you may want to abide by this, but to me it makes me sick. It is just not true and they know it. That's my objection.

Mr. Gelber: . . . .

My concern is I am not going to argue from the well of the court. I haven't and I will not. This emotional argument which is projecting in front of the jury is not part of the rules of this courtroom. I am trying to do an examination pursuant to the rules and I will obviously abide by the Court's instruction, but I think it is absolutely unprofessional of Mr. Levine and it is not fair to the government actually for him to do what he is doing.

The Court: I would ask, Mr. Levine, again, direct Mr. Levine, please don't argue from the well of the court. I would be happy if you want to any time put anything you want on the record.

Mr. Levine: Your Honor, there is no requirement, Mr. Gelber knows it, that the disbursements that came from the bank of the trustee which were justified by an invoice had to go to pay that invoice. These are general. They don't have to go to that specific sub. He knows it, and that distinguishes UDAG from others. He knows this. He makes these arguments here. He knows it is not true.

Now, your Honor wouldn't know that because your Honor hasn't been involved with evidence like we have, but he knows it and he knows the regulations, and he does, and that is why these attacks are in part personal because what is happening here, your Honor, is the government is not doing what is required of the government. This is not an honest prosecution. That's the problem here. There is a fraud on this Court. There is a fraud on this jury, and most significantly, there is a fraud on this defendant, and that is all I want to say.

The Court: You have said it ad infinitum.

(Tr. 7021-7024).

X.

Later that afternoon, Mr. Levine started his cross-examination of the government's witness Ms. Abbamonte. After what was intended to be a lengthy, dramatic pause, Mr. Levine began in a loud and abusive manner as follows:

Mr. Levine: Ms. Abbamonte, tell the ladies and gentlemen of the jury about your psychiatric care.

Mr. Gelber: Objection, your Honor.

A: I beg your pardon?

Mr. Levine: Tell the ladies—

Mr. Gelber: Objection, your Honor.

(At the side bar.)

. . . .

Mr. Levine: We believe we have a good faith basis for asking questions about this woman's phychiatric status.

The Court: Well, of course the federal rules do oblige me to protect the witness from undue harassment. [Fed. R. Evid. 611.] That may well fit within that area. You have said this person is incompetent? You certainly haven't said anything so far. What are you basing your question on.

Mr. Levine: It goes to her bias, your Honor. Competency standards are somewhat easily met for the witness, so I am not suggesting that this woman is incompetent. I am suggesting, however, your Honor, that she has a bias, that she suffers from a psychiatric condition, that she has been in the care of a psychiatrist, and I would like to probe her on that care,

on her diagnosis, and I would like to probe that. She is a very angry lady and she is paranoid. That's the information we have, your Honor.

Mr. Gelber: . . . If he has a psychiatric report he can refer to, I certainly would like to see it and I hope the Court would because I feel uncomfortable when a lawyer stands before the witness and starts accusing her of having psychiatric problems without a basis and at this point other than Mr. Levine's belief, I don't think he has provided a basis for a reasonable basis for the inquiry of the area.

Mr. Levine: She has told people when she worked there, she told people there about her conditions. That is how I know it. That is one of the ways I know it.

Mr. Gelber: What conditions are we talking about?

The Court: Help me out. The witness will not be subjected to anything. Harassment is one of the things, and it is my job to protect them.

Mr. Davis [counsel for defendant Steier]: She had mental illness during the time she was doing this?

Mr. Levine: That is my understanding. She discussed with some of other co-workers the mental anguish she suffered at the time she was there.

. . . .

The Court: Some witness, some other employee said she said something is all you have. I will not permit her to be harassed.

Mr. Gelber: Your Honor, could we have a instruction to disregard? I feel it would be appropriate at this point.

The Court: I keep hoping Mr. Levine will cross-examine by asking questions instead of trying to testify.

Mr. Levine: I asked a question, Judge. That is not fair. If you don't want me to go into the area, that is fine, but what I—

The Court: I don't want to play a game with you.

Mr. Levine: I don't like this record to even, by your Honor to be, for that to be said. That's not what I did. I asked the question. If your Honor doesn't like the question I will move on, but I wasn't testifying. As a matter of fact, the question was tell the ladies and gentlemen of the jury about the psychiatric care. Now, that gives the witness the right to—the chance to respond in a narrative. As a matter of fact—

The Court: The question is improper.

Mr. Gelber: Your Honor, I would ask for an instruction.

. . . .

The Court: Well, I don't know quite what to tell the jury, because Mr. Levine will tell me nothing other than she supposedly said something to some employee which is no basis to permit this to be explored.

. . . .

Mr. Gelber: Your Honor, for whatever it is worth, our request would be that the jury be instructed that the question was improper or inappropriate. . . .

. . . .

Mr. Levine: I object to that instruction, your Honor. If there is an objection and you want to sustain it, tell the jury it is sustained. If you wanted them to disregard the question tell them to disregard the question, but do not, I would ask this Court, tell the jury that it was an improper question. I, frankly, don't think it was improper. If your Honor wants me to move on to other areas I will move on.

The Court: I would like you to move on to questions relevant to this case.

Mr. Levine: You say that this witness was irrelevant to this case. This witness was here to smear Mr. Briscoe. I am going to do the best I can with what you give me, but I object to the proposition that the question was improper. If you want me to move on—

The Court: I think the question definitely was improper.

Mr. Levine: So you sustain the objection. That's okay.

The Court: I have, and let's try to stay within proper bounds.

Mr. Levine: I will always do that.

The Court: Well, you haven't.

(Tr. 7098-7107).

XI.

Later that afternoon, during Mr. Levine's continued cross-examination of Ms. Abbamonte, Mr. Levine again disregarded a ruling of the Court. When he thereafter was instructed to comply with the Court's ruling, he questioned the Court's impartiality:

Mr. Levine: But for the filing of that request, HUD just wasn't going to share that information with any of the Briscoe entities; isn't that so?

Mr. Gelber: Objection, your Honor.

The Court: The objection is sustained.

Mr. Levine: HUD sought to keep that information from the Briscoe entities; isn't that true?

Mr. Gelber: Objection. Judge, can we go to the side bar?

The Court: The objection is sustained.

(At the side bar.)

The Court: Yes, sir.

Mr. Gelber: Your Honor, I object not only to this —I object not only to the question the Court has already sustained but that question was simply repetition of the question previous to which you had already sustained, and I mean, I understand that he is trying to make a point to the jury, but he is arguing at this point, and I think asking the subsequent question was nothing more than violating the Court's previous order on the exact same question. . . .

I make an objection to a matter and you sustain it. I suspect that that is because you agree with the position of the government that is no longer an area to go into, and Mr. Levine louder and more emotionally asks the same question in the same area over again. As a matter of fact, he changed it a little bit. He made the part that was objectionable even more apparent. I mean, there has got to be a point when I don't know what to do. I am not sure if I am here asking for sanctions or not. If we are going to get to this point I want to know if he is not able to control himself. I am going to ask the Court to do something because he is asking a lot of objectionable questions. I think the government has a right for him not to do that.

Mr. Levine: Your Honor, apparently Mr. Gelber and the Court have some telepathy going on here. He makes an objection. The Court rules on the objection, and maybe through some air wave that eludes me I don't know the grounds for the objection and I don't know why it is sustained, so I try and change the question to accommodate what at first blush appears to be the reason for the objection. I try and change it to accommodate it.

Now, if I knew the grounds, I would be able to deal with it, but just because an objection is made and

the Court sustains, it doesn't mean I have to leave the subject area. I am trying to stay within the subject area.

The Court: You have repeatedly asked the same questions that I have sustained objections to—

Mr. Levine: I disagree.

The Court—as the record will reflect, and there is no mental telepathy.

Mr. Levine: I have no idea what the last objection was, why the objection was made and why it was sustained. I haven't got the foggiest idea.

The Court: That is the most surprising thing I have heard during the course of the trial.

(Tr. 7130-7133).

XII.

At the beginning of the session on November 18, the Court commented on the proceedings of the previous day:

The Court: . . . I will go back to 611, Rule 611 of the Federal Rules of Evidence which I talked about before. It obliges me to exercise quote "reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1), make the interrogation and presentation effective for the ascertainment of the truth, (2), avoid needless consumption of time, and (3), protect witnesses from harassment or undue embarrassment."

. . . .

Mr. Levine made a series of comments indicating that he didn't have any idea why the objection that I sustained was made or why it was sustained. I found that, frankly, disingenuous, but I would remind the parties of how we have proceeded. I have directed counsel not to argue objections from the well of the

court. If I understand, as I told the jury, if I think I understand what the objection is, I will rule on it.

If any party—I mean any counsel at any time is free to request a side bar which we can discuss things in case—because often I will ask for them, as you know, because I don't know the case as well as you do, but I do think that—I do think we are having questions asked which I must confess, I believe Mr. Levine knows are objectionable and that, indeed, I can't believe he doesn't understand why an objection is made to begin with. Mr. Levine, any time you want to put anything on the record, please ask for side bar and I will make sure I understand your position.

. . . .

Mr. Levine: . . . .

If it pleases your Honor, I want to say this, that during the course of this trial the Court's reprimand and disapprobation has been directed at me. If I am guilty of anything at all it is in discharging my obligations to this client. I have done it with vigor. I believe the Court's disapprobation, the reprimand and in some times it is scorn, chills my ability to discharge my obligation.

. . . .

Your Honor, I am trying very hard. This Court has indulged what I believe to be a prosecution that is not only ill-advised, but corruptly advanced.

The Court: We have heard this speech so many times, Mr. Levine.

Mr. Levine: Well, your Honor, yes, you have. It is true. I am merely trying to meet the statements made on this record by the Court and the effort made by this prosecutor and this prosecution team to seek sanctions against a lawyer who is doing nothing more

than trying his hardest. I object to the Court's reprimand.

The Court: What in your mind was a reprimand, just so the record is clear.

(Tr. 7163-7169).

XIII.

Shortly thereafter, Mr. Levine tried to admit Briscoe Exhibit 41 into evidence. The government called for a side bar to object to the exhibit's admissibility on three grounds: that no foundation had been laid, that the exhibit was irrelevant, and that the exhibit fell outside the proper scope of examination.

Mr. Levine: If it please, your Honor, the reason I didn't ask any more questions with respect to the foundation is because I have been told by the Court not to ask questions about the document until it is in evidence, so there are other questions that could be asked, but what the letter does do, Your Honor, is it does show that how the Briscoe Company was defending against the audit with this witness' assistance. . . .

. . . .

Mr. Gelber: Your Honor, on a foundation point, Mr. Levine could have said have you seen this document before without telling us what is says. . . .

. . . .

Mr. Levine: Your Honor, we tried to keep the 404 (b) audit out. I beseeched this Court many times not to let the government go into the HUD, don't let them call a witness who would speak on it in this court and you overruled by objection. I told you it would be an execution to let it in. The government's position was let them go into it on cross. Now we are in cross and I want to deal with it only in the most marginal way. I have asked the witness about

her role in responding. That's all I have asked about, her role in responding to the audit. She has testified that it was a shortfall. She testified that her own investigation confirmed it. How do I deal with that if I can't asked her questions about it? And now the Court is scorning me again. Your Honor—

The Court: I didn't scold you.

Mr. Levine: Yes, you did.

The Court: You interrupted when I was in the middle of a sentence.

Mr. Levine: I didn't mean to do that. I am sorry.

The Court: All I was saying is that I hope you can keep this witness to what this witness knows. This seems it pretty clearly would be confusing to the jury and goes beyond the scope and is not properly admissible to say nothing of how you are supposed to lead the witness to which this letter should be introduced. The objection is—the letter will not be admitted.

Mr. Levine: May I try and cure the issue of foundation?

The Court: I have great trouble seeing how you are going to cure it.

Mr. Levine: I don't know if I can or not.

The Court: Since it is confusing to be evident to the jury under 403, it seems to be irrelevant. We start out with this—I haven't got time to explain every ruling,

Mr. Levine: You understand that.

Mr. Levine: Actually, I don't.

The Court: You are so experienced and you are such a good lawyer. You are acting like you don't know what is going on here.

Mr. Levine: Your Honor, there were three objections raised. One was foundation, one was relevance, one was scope. . . . The ground for sustaining the objection is fundamental. I need to know what the Court's instruction is. . . .

. . . .

The Court: That is why I referred to 403. The exhibit will not be received.

Mr. Levine resumed questioning the witness and again tried to use Briscoe Exhibit 41:

Mr. Levine: Did you have an opportunity to read Briscoe 41 for identification to yourself?

A: Yes.

Mr. Levine: Does Briscoe 41 contain the data that you supplied in communicating with Dr. Dubose?

Mr. Gelber: Objection, your Honor.

The Court: Could we talk for just a minute, please.

(At the side bar.)

. . . .

The Court: The fact of the situation has not changed. Clearly she provided that information to him. She said she expected him to use it. It doesn't clear the problem of the exhibit. I wish my rulings could—

Mr. Levine: I was trying to cure the problem. I was trying to link the two.

The Court: You interrupted again. I guess maybe some day you won't do that. The objection is sustained.

(Tr. 7174-7183).

XIV.

Later that morning, Mr. Levine continued to ask improper questions on cross-examination and to discuss the substance of documents not yet in evidence:

Mr. Levine: First of all, you know that Hodges & Son is a minority subcontractor, don't you?

A: I have met Mr. Hodges—it is not Mr. Hodges. It is Doug Long and his partner.

Mr. Levine: These are black subcontractors, aren't they?

A: Yes.

Mr. Levine: And you know that it was Mr. Briscoe's intention to give work to minority subs; isn't that correct?

Mr. Gelber: Objection, your Honor.

The Court: The objection is sustained.

Mr. Levine: And you know that Mr. Long and Hodges & Sons didn't have within its organization the ability to administer the contract but it had the fine ability to do the electrical work; isn't that correct?

A: I do not know if they had an administrative capacity at all, no.

Mr. Levine: And you know that the contract with Hodges & Son provided for the Briscoe entities to do the administrative work on the contract, don't you?

A: I would have to read the Hodges contract.

Mr. Levine: You don't have to read the Hodges contract to know that because you could read it from your own letter that you wrote at the time; isn't that true, Ms. Abbamonte?

Mr. Gelber: Your Honor, objection.

The Court: The objection is sustained.

Mr. Levine: I would like it marked.

The Court: Could we talk for just a minute, please.

(At the side bar.)

The Court: Yes, sir.

Mr. Gelber: Your Honor, other than being argumentative, the last ten questions have been only you know, you know, you know attempting to put facts in which most of the time the witness says I don't know anything. It is pure unadulterated argument by counsel. . . . Every time we raise the issue he does it again, and this isn't the 10th or 20th time. I think we are well beyond that point and I don't know what I can ask the Court to do to prevent Mr. Levine from referring to exhibits that have not been ruled on by this Court as competent evidence before the jury. . . .

Mr. Levine: I have not read one word from that letter, not one.

The Court: You are being extremely argumentative and extremely hostile. I don't know why you persist in this, but I don't know where you are going. I don't know this letter, but, once again, you are referring to a matter that may or may not become an exhibit before it gets in. You know the right way to proceed, Mr. Levine.

. . . .

Mr. Gelber: . . . Should I request sanctions of some type, some kind of proceeding, because he is not going to follow the Court's rulings on this obviously.

The Court: The record makes that very clear. I don't know what I will do at the end of the proceeding today or whether I will have to wait until the end of the proceeding before considering sanctions,

but so far I have had no success in asking Mr. Levine to proceed properly.

Mr. Gelber: Judge, unfortunately while that may deal with Mr. Levine professionally, it does not—it alters in no way the ability of the government to present the evidence to the jury so that they can make the decision based on the evidence. Respectfully I don't mean to insult the Court's position on this point, but that only deals with Mr. Levine personally and professionally in relationship to the Bar. It doesn't deal with what he does in the courtroom, and I do not know what I can ask the Court to do more than I have already done.

You haven't disagreed with any statement we have made on this matter yet; yet every time we come up here he does it again, and I have never asked any Judge to hold an attorney, even if I believed it was contemptuous, to hold an attorney in contempt, but at this point repeated repetition of the same thing over and over again, and this is not an inexperienced attorney, I am not sure what the Court can do, but I know there are threats of fines, incarceration which will stop an attorney from doing those types of things, and I don't know how I can present the government's case if Mr. Levine continues to flagrantly violate the Rules of Evidence and this Court's direct admonishments.

. . . .

Mr. Davis: . . . with respect to this particular instant I don't think there is anything objectionable. He asked for something marked.

The Court: Let's be more specific on that. The minute the witness said something he shouted quite loudly let this be marked as an exhibit or something to that effect. This was not a normal tone of voice. This was in effect seeking, implying by the tone of

his voice that the witness was somehow grossly wrong and he was going to clear this up through this exhibit without any idea of my ruling on the exhibits whether they were admissible on or not. Unfortunately, the transcripts don't reflect the true nature or the true conduct of the case.

Mr. Levine: Your Honor, I disagree with that, totally disagree with that, and to the extent it reflects your views I want it to reflect mine. I disagree. Your Honor, I affirm I have been vigorous but I have been within the rules. The witness said she had to read the contract and I said you didn't have to read the contract because you wrote your own letter about it, and what I wanted to do was to have her letter marked, and this is where we were when Mr. Gelber objected—I didn't go into the content and I didn't raise my voice, but this woman—

The Court: Mr. Levine, that is absolute nonsense.

Mr. Levine: Your Honor, I don't want to quibble. I don't want to—I wanted to try this case. The government has been—

The Court: Lower your voice a little bit, please.

Mr. Levine: Maybe, your Honor—listen, your Honor has gag orders, threatened me with contempt. The government has come up many times asking for sanctions or contempt, and in these side bars you say you don't know if you can wait to see if it has to be done now, it has to be done afterwards. I can't function this way Judge. I can't. I you want to put me in jail, do it now.

The Court: It doesn't seem to bother you in the slightest.

Mr. Levine: It does, your Honor. I can't tell you how it offends my core that a Judge of this court would think those things of me.

The Court: The record will reflect.

Mr. Levine: I am doing what I think is not only a professional job but a good job, and I am going to follow the rules and I am going to withstand all the allegations made by the government and I am going to withstand the comments made by the Court. I intend to defend this man until this jury finds him innocent. That is what I intend to do.

The Court: We will ask you, Mr. Levine, for about the 55th or hundredth time, will you, please, conduct yourself properly in accordance with the rules as you know them so damn well.

(Tr. 7239-7247).

XV.

Notwithstanding these clear warnings, Mr. Levine continued to try to put inadmissible evidence before the jury through his cross-examination:

Mr. Levine: So you come here and you testified about these transactions, and you have called these kickbacks, and you never spoke to Mr. Briscoe about them and you never spoke to Mr. Horton about them; isn't that correct?

A: That's true.

Mr. Levine: And at the very time in the file for which you were the record custodian there were checks of which these are just a small representative portion—

Mr. Gelber: Objection, your Honor.

. . . .

(At the side bar.)

Mr. Gelber: Your Honor, so we are very clear as to what this witness has said and what Mr. Levine has just said, this witness was shown $30,000 in checks who said over $300,000 came in. Now there

has been not one other piece of document suggesting there are other checks or anything suggesting that $30,000 that is now in evidence is anything more than the total. Not one piece of evidence. Mr. Levine's question, and if it is read back I am quite confident it is in the positive that he used, and this is just a small fraction of it, is nothing more than an attempt on his part to suggest to the jury that there is evidence out there that has not been admitted to the jury and put before the jury, it might be admitted before the Court but it is not before the jury now. It is such flagrant violation of anything the Court has told him to do.

Mr. Levine: You are speaking very loudly, I am being told.

Mr. Gelber: I am sorry. It was an absolute purposeful attempt to put evidence before this jury that is not part of the record, and that is represented by the documents which are not part of the record and is exactly what he said on a previous occasion, and I think we just talked about this before lunch, and I am absolutely amazed, because it is a critical point. This witness said this is 30,000. He got 300 [thousand dollars] back. He just said it is a small amount. The witness didn't say that. No documents have said that. The only person who has said that is Mr. Levine to the jury in his question, and it wasn't part of the question. . . . I do not know what to do any more when it comes to this. I know the Court has contemptability.

I know the Court can tell him that not only is it inappropriate but he can be fined or even incarcerated. I think at some point he has to ask his questions and not testify to the jury in absolutely impermissible and contravention of the rules and your prior order.

. . . .

The Court: I don't know whether it is the same person I have known or what. It is the same objection. You persist in asking questions in the same form.

Mr. Levine: Your Honor, do you see what this witness has done? This witness on direct examination said—this witness right here to you in this court—

The Court: Could you not ask her a small portion? Just ask whether or not it was—I am hearing in part what all the evidence to the jury is doing, and I don't want to mislead you, Mr. Levine. My law clerk is spending this afternoon researching contempt. I thought you could go on with the proceedings and undo what was being done. I don't understand why you keep doing this transgressing in this fashion.

Mr. Levine: Do you think, your Honor, that I really want to be in contempt? I assure you I don't want to be in contempt. Your Honor, please . I am trying so hard. This prosecution is formidable. . . . This witness is inventing everything.

The Court: You can ask her about that. We are talking about in your question you are trying to bring before the jury that which is not evidence.

Mr. Levine: Your Honor, this witness has testified that she never saw any advances to Mr. Horton. There are other advances. This is not a game. Mr. Gelber knows that these are in the records. His office has the records.

The Court: The objection is sustained. You know the question is not proper.

Mr. Gelber: Your Honor, Mr. Levine's belief that the witness is being inventive is not a basis for his violation of the rules.

Mr. Levine: I wasn't violating rules.

. . . .

The Court: . . . I am not attempting to gag [Mr. Levine]. I feel an obligation to put him on notice, that I am considering after this trial to find him in contempt if this continues. I no longer am thinking in terms of whether. I have to do something after the trial is over. I think it is only fair to let it be known.

(Tr. 7348-7353).

XVI.

The conduct that directly preceded the contempt citation occurred during the morning session of November 19 when Mr. Levine tried to have proposed Briscoe Exhibit 46 received into evidence. After hearing argument on this document at side bar, the Court ruled that the document was inadmissible under Rule 403. Mr. Levine then continued to argue the document's admissibility:

Mr. Levine: Your Honor, this evidence not only shows, not only part of the proof that he didn't loot it; it comes in to show that she knew it didn't. This very witness.

The Court: We have spent a half hour on this exhibit and I have ruled. How much more do you—

Mr. Levine: Your Honor, as always, I will follow the rulings of the Court. May I make one suggestion? May I offer it, your Honor, if I redact, if I redact everything else in the letter except what it is and the paragraph I have read so it would be the introduction, the paragraph 5A and then the signatures?

Mr. Gelber: We have the same objection, your Honor. Your Honor, we are ready to put the witness on the stand.

Mr. Levine: The government's impatience with our injustice is remarkable. They are ready for sentencing, your Honor.

Mr. Gelber: Your Honor, shall I call the witness?

Mr. Levine: Yes. I would like a ruling on the proposal that it be redacted and be admitted in redacted form.

The Court: You are asking me to rule on—you want—I have been given an exhibit which I have concluded is not admissible. Now you want me to sit here and redact it.

Mr. Levine: No. I told you the redaction. I want to redact it and I am moving it into evidence in the redacted form and I have described the redaction.

. . .

The Court denied this request. After the side bar was completed and the jury returned, Mr. Levine continued his questioning of the witness, Ms. Abbamonte, and continued to try to admit Briscoe Exhibit 46:

Mr. Levine: You told us yesterday, Ms. Abbamonte, that Mr. Briscoe was entitled to receive personally over $800,000 from Belle Glade; isn't that right?

A: Briscoe Enterprises Limited, the developer, was entitled to receive those funds. I would really hate to say without looking at Belle Glade's documents whether he was entitled to receive them personally.

Mr. Levine: Well, you told us yesterday that you were aware that he was owed over 300—excuse me, over $432,000 for developmental costs that he advanced; isn't that right?

A: I did not say that. I said $432,000 was drawn down on a draw from Belle Glade and was stated

for general requirements. Mr. Briscoe at that point did not put $432,000 in the project.

Mr. Levine: He had advanced that money; isn't that true?

A: That's not what I said, Mr. Levine.

Mr. Levine: That is what you said yesterday, isn't it, Ms. Abbamonte?

A: No, that's not what I said.

Mr. Levine: In any event, it was money that he was entitled to and properly booked in Belle Glade; isn't that correct?

A: The developer was entitled to that money. The developer was Briscoe Enterprises Limited.

Mr. Levine: All right. The developer, Briscoe Enterprises Limited, was entitled to $432,000; isn't that right?

A: It was drawn down, that's true. I am going to assume it was appropriate.

Mr. Levine: You have no evidence that it was inappropriate?

A: No.

Mr. Levine: You, in fact, yourself knew it was, in fact, appropriate, isn't that true?

Mr. Gelber: Objection, your Honor. Just asked and answered.

The Court: I think it has been covered.

Mr. Levine: Your Honor, may we go to side bar?

The Court: Yes, sir.

(At the side bar.)

Mr. Levine: Your Honor, the exhibit which we just discussed proves that she knew it, and I want to,

again, renew my motion to put it into evidence. . . . She knew it, and when she says what she just said, she is hedging and I want to use this document.

Mr. Gelber: Your Honor, the witness isn't hedging. My objection was repetition, because she has agreed on I think at least twice, maybe even more than that given the fact he has asked it a few different ways to the point Mr. Levine is making. That is the only reason I am here. I am the same objection to the document being introduced as I raised before. This record is very clear and going to show whatever Mr. Levine's argument is he is not entitled—I mean this witness is not hedging. This witness is saying exactly what she thinks.

Mr. Levine: She just said that she assumed, but she didn't seem to know. This says she knows. She didn't—she said she assumed he was entitled to the transfer but she wasn't prepared to say that she knew it.

. . . .

. . . I would ask the Court—I don't want to do it—although I knew I was notwithstanding the Court's order based on her new approach to this, her new testimony.

The Court: What is the new approach?

Mr. Levine: Yesterday she conceded that Mr. Briscoe was entitled to the excess of $800,000. Today she just said she assumes it. I want to prove that she knew it. I don't want an assumption. I want to use this, and in the ordinary course I would be able to do it without coming to side bar, but this Court has put me on notice of contempt.

This Court is chilling my ability to cross-examine the witness, so I want to come over in a cautionary way—

The Court: Mr. Levine, I normally don't get through the day without quoting contempt on 42(a). I want to be fair to you. I am trying to be fair.

Mr. Levine: I don't think you are being fair to me. I am trying to defend this case. I have come to side bar because I want to do it with the Court's permission. That's what I have come here for. I have come here to ask the Court's permission and the Court's response to my request for permission is the threat of holding me summarily in contempt. That is, I submit, not right. I would like to get back to the issue in the case, your Honor. I would like to use this document.

The Court: The objection that I have before me is the objection to the question. The objection is sustained.

Mr. Levine: There is no question before the Court. I asked to come to side bar.

The Court: Please do not talk quite so loud. I thought that you asked the question and I thought there was an objection. Am I—

Mr. Gelber: That is exactly right, your Honor. I thought we came here because I had said from the well asked and answered. . . . I have the same objections I have to the document.

Not only have we done it three times today, but Mr. Levine, as he said a moment ago, we did it yesterday too and he is badgering the witness on the same point she has conceded in two different days.

Mr. Levine: If the government would say she conceded, it would be very simple, your Honor. This is a very simple proposition. I am not trying to be contentious. If the government wants to tell the jury it conceded, that is fine.

The Court: Let's move on, Mr. Levine. There was an objection. I have sustained it.

Questioning of the witness by Mr. Levine continued:

Mr. Levine: In addition to the $432,000 to which Brisco Enterprises was entitled, I believe you testified yesterday there was another $400,000 to which it was entitled; isn't that correct, and that was in the form of construction overhead?

A: Mr. Levine, I will be happy to tell you that $432,000 of general requirements and $312,000—$312,500 of supervision was drawn from Belle Glade and given to Briscoe Enterprises Limited. It was on a draw. I will not make a certification, a legal judgment, an accounting judgment it was proper. I would be happy to tell you it did do that.

Mr. Levine: Now, your Honor, I would like to come to side bar again.

The Court: All right.

(At the side bar.)

Mr. Levine: Briscoe 46 shows that she did, in fact, at that time make the certification. Her certification. She won't give it to me now. I can prove that she did it then. I would like permission of the Court to do that.

. . . .

Mr. Gelber: I have the same objection. Not only the same objection, but your Honor rules about badgering witnesses about the same subject.

The Court: Right. It is extraordinary.

Mr. Gelber: To the extent you can put things in reference, I as opposing counsel feel obliged to give some leeway, but this isn't putting it in reference. He is arguing it again in the same way he argued it yesterday which was improper, and now he is

trying to put it at issue by arguing with her more and we have done this already. We have gone down this road and he spent a lot more time on cross than I did on direct and it is time that he move on.

Mr. Levine: I am sure they do, because this is painful. This goes right to the heart of their case and they know it and this document proves it and we know the truth and they are here trying to conceal it.

The Court: Let's move forward, please.

(In open court, jury present.)

The Court: Yes, sir. You may proceed.

Mr. Levine:I would like to approach the witness. I show you what has been marked as Briscoe Exhibit 46 for identification.

Mr. Gelber: Objection, your Honor.

At the side bar, Mr. Levine asked to use the exhibit to refresh the witness's recollection. The Court denied that request and asked Mr. Levine to move on.

Mr. Levine: So, Ms. Abbamonte, there was 432,000 plus 300 and what?

A: 312,500.

Mr. Levine: 312,500, so that's $750,000 that went to Briscoe Enterprises Limited; is that correct?

A: Yes. 744,500. That's true.

Mr. Levine: $744,500, right?

A: Yes.

Mr. Levine: That went to Briscoe Enterprises Limited in a proper way; isn't that true?

A: Mr. Levine, the money moved. I don't wish to nitpick. I did not do an audit of Belle Glade.

Mr. Levine: But Bell Glade was audited, was it not?

Mr. Gelber: Objection, your Honor.

The Court: We have covered this several times, Mr. Levine.

At that point, Mr. Levine was conducting his cross-examination from the lectern. In a loud, argumentative tone, he then, in open court, added the proverbial straw that broke the camel's back. He stated:

Mr. Levine: I want to get it straight, your Honor, because the witness is changing the testimony and I want to get it straight.

Mr. Gelber: Your Honor.

The Court: Let's have side bar conference, please.

(At the side bar.)

The Court: Yes, sir.

Mr. Gelber: Your Honor, I object to the area and I object to another—I am not sure that the court's ruling has been through the course of this trial we are not supposed to argue to the jury anything. Now Mr. Levine takes it upon his self to say to the jury his opinions to contradictions. It is not even a question. It is so improper I am not sure why—well, I think it is—I am not saying more.

Mr. Levine: I will withdraw the remark, your Honor. I will move on.

The Court: I think I have no choice Mr. Levine, but to hold you summarily in contempt. I sentence you to four hours incarceration, beginning at the end of the trial today.[6]

(Unproofread transcript 15-39).

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[6] Mr. Levine spent the four hours in the cellblock of the courthouse, joined voluntarily for the entire time by Ms. Metlin and Mr. Clark of his firm, and for part of the time by counsel for defendant Wilson. (That, of course, was with the specific approval of the Court).

XVI.

The interplay between Mr. Levine and his client, defendant Briscoe, also deserves mention. When side bar conferences have been conducted while the jury is in the courtroom, all participants have been expected to keep their voices sufficiently low so that they would not be heard by the jury. A considerably smaller number of side bar conferences have been held without the jury's presence in the courtroom—as, for example, when an objection has been made just when a recess normally would be taken and the Court excuses the jury. At the latter type of conference, Mr. Levine has often raised his voice considerably, particularly when expressing his repeated objections to the entire prosecution, so that his client readily could hear his objections.

Defendant Briscoe is or affects to be a volatile person. The record does not reflect adequately defendant Briscoe's conduct in the courtroom. During the trial defendant Briscoe has (1) audibly cursed an Associated Independent Council (Mr. Howard), (2) audibly cursed a government witness whom he once employed (Ms. Abbamonte), and (3) been physically restrained on several occasions in a relatively unobstrutive, but still noticeable way by a variety of defense counsel who have cooperatively, and wisely, recognized that outbursts by defendant Briscoe are unlikely to aid the defense case. Mr. Levine's overall conduct during the trial, as was true at the status calls prior to trial, inevitably has fanned the flames of defendant Briscoe's discontent at being a defendant in three indictments. Unfortunately, there is little confidence on the part of the Court that this finding of contempt will prove to be the only one.

XVII.

It is certified that the above-described conduct, all of which occurred in the actual presence of the Court and was personally seen and hear by the Court, constituted

a contempt of court by Barry M. Levine, which contempt seriously and substantially interferred with these proceedings and obstructed the orderly administration of justice.

/s/ Stanley S. Harris
STANLEY S. HARRIS
United States District Judge

Date: Dec. 1, 1992

[Filed Dec. 1, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 91-399 SSH and 92-86 SSH

UNITED STATES

v.

LEONARD E. BRISCOE, LANCE H. WILSON and
MAURICE DAVID STEIER

ORDER

Pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, and for the reasons stated in the accompanying Order of Contempt, it hereby is

ORDERED, that Barry M. Levine, counsel for defendant Briscoe, be, as he was orally on November 19, 1992, summarily adjudged in contempt of this Court. It hereby further is

ORDERED, that he is sentenced to incarceration for the four hours already served on that date.

SO ORDERED.

/s/ Stanley S. Harris
STANLEY S. HARRIS
United States District Judge

Date: Dec. 1, 1992

[Filed Sep. 15, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-3262

IN RE: BARRY W. LEVINE

BEFORE: Buckley, Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed August 12, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:

RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Sep. 15, 1994]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-3262

IN RE: BARRY W. LEVINE

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing *In Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *in banc,* that the suggestion is denied.

Per Curiam
FOR THE COURT:

RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Mikva and Circuit Judge Sentelle did not participate in this matter.

[2486] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket Nos. CR 91-0399, CR 92-0086

UNITED STATES OF AMERICA,
Plaintiff

vs.

LEONARD E. BRISCOE, SR., LANCE HENRY WILSON,
MAURICE DAVID STEIER,
Defendants

VOLUME XII
TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE STANLEY S. HARRIS,
United States District Judge, and a Jury
Washington, D.C., October 19, 1992

* * * *

[2561] THE COURT: Let me back up there because I thought I heard Sowell's name in the question. You are telling me what the question is.

MR. DAVIS: Did you later learn that Mr. Wilson had the—was it from Mr. Sowell that he had the authority to issue that letter, and Mr. Sowell is the one that told him he didn't, that he testified on direct—

THE COURT: It seems to be clear hearsay. What is the exception?

MR. WELLS: The exception is he elicited the entire conversation. It is like saying now I can't cross-examine on it, your Honor. Now, if I decide he brings something out and I decide for whatever reason, okay, I am going to have the conversation and I want to cross on it, he is, he

is basically saying I can only cross on one part of it. That is what you are saying. Those are the rules.

MR. LEVINE: Doesn't your Honor want to know what the answer to that question is? We have been trying to find out what happened here.

THE COURT: My problem is I have to [2562] enforce the rules of evidence. I want to say one thing. I am not appalled. I am dismayed by the extent to which counsel repeatedly are suggesting that my rulings are not fair. This has never happened to me in 20 years as a Judge before. If you all think that you are going to intimidate me by attempting to insult my integrity, you've got another thing coming. I will decide on the rulings of evidence.

MR. LEVINE: I apologize. I didn't mean to.

THE COURT: I am dismayed.

MR. LEVINE: Your Honor, on the substance—

THE COURT: The question seems clearly hearsay to me. The objection is sustained.

MR. WELLS: Your Honor, I will be able to finish in about five minutes.

(In open court, jury present.)

THE COURT: The objection is sustained.

BY MR. WELLS:

Q. Did you have a conversation with Stan Newman concerning Mr. Sowell checking up on Lance Wilson?

A: Yes, I did.

* * * *

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket Nos. CR 91-0399, CR 92-0086

UNITED STATES OF AMERICA

v.

LEONARD E. BRISCOE, SR., LANCE HENRY WILSON,
MAURICE DAVID STEIER

VOLUME XXXIII
TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE STANLEY S. HARRIS,
United States District Judge, and a Jury
Washington, D.C., November 18, 1992

* * * *

[221] Q. It showed the more than $800,000 going to him, did it not?

A. Yes.

Q. So that money was his to do whatever he wanted, including buying cars, buying houses, buying groceries or anything else in the world; isn't that true?

A. Yes.

Q. And with respect to him coming into possession of that money and the regularity of the exercise, you wrote a letter to Deloitte & Touche; isn't that correct?

A. If you would let me see it, I would be certainly happy to say that I had.

Q. Well, do you remember writing a letter to Deloitte & Touche, the independent auditors, that did the audit on Belle Glade?

A. Deloitte & Touche were our auditors. I wrote more than one letter to Deloitte & Touche and you talked to

them on a daily basis so I would be more than happy to tell you that.

MR. LEVINE: Let's have this marked, please.

THE CLERK: Defendant Briscoe Number 46 [222] marked for identification.

(Defendant Briscoe's Exhibit Number 46 was marked for identification.)

MR. LEVINE: Your Honor, I show a copy for the court and a copy has been given by my colleague to the government.

BY MR. LEVINE:

Q. Now, I show you what has been marked as Briscoe Number 46 for identification and ask if you can identify it.

A. Oh, my. This is a letter that was written to Deloitte & Touche—

THE COURT: With exhibits we follow the process of can you identify it. Yes or no.

Q. Can you identify it?

A. Yes.

Q. Inviting your attention to the last page, is that your signature?

A. Yes. Yes.

Q. And that is at the date of February 1, 1990?

A. Yes.

MR. LEVINE: I move it into evidence, your Honor.

[223] MR. GELBER: Brief side bar, your Honor.

THE COURT: Yes, sir.

A. There is one thing missing on this. Mr. Knapp's signature.

THE COURT: Why don't we excuse the jury at this point. Since we are so close to 5, before we—I have a funny morning tomorrow. I do have two criminal status calls, and I have a sentencing and most lawyers, as you know, can do a pretty good job of chatting and the lawyer I have for the sentencing is the most talkative lawyer I have even had, but the last time I had him he said, Judge,

I know you are busy and I am not going to say much this morning and he surprised me half to death.

I think we can safely say, I don't know what is going to happen tomorrow morning. I will ask you to be back and ready to go at 10:30. I think I can accommodate the three matters I have by then. If not we will run over a lit bit. We will excuse the jury at this point. I remind you not to discuss the case at all.

(Jury excused.)

* * * *

[7379] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket Nos. CR 91-0399, CR 92-0086

UNITED STATES OF AMERICA

v.

LEONARD E. BRISCOE, SR., LANCE HENRY WILSON,
MAURICE DAVID STEIER

VOLUME XXXIV
TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE STANLEY S. HARRIS,
United States District Judge, and a Jury
Washington, D.C., November 19, 1992

* * * *

[7381] PROCEEDINGS

(In open court, jury not present.)

MR. LEVINE: Good morning, your Honor.

THE COURT: Good morning.

Sorry to have been longer than anticipated. I had to take the bench in both of the criminal status calls, and then sening that the defendant was looking at an awful lot of time and defense counsel wanted to argue for departure, the guidelines, and it just took longer than I had anticipated.

Anything from counsel at this point?

M. GELBER: Your Honor, when we left I believe we were discusing Mr. Levine was attempting to introduce—I am not sure what the exhibit number is.

THE COURT: 45

MR. GELBER: Oh! Ms. Abbamonte, could you excuse yourself outside for a moment.

(Witness excused.)

THE COURT: I believe it is 45. Do you agree, Mr. Levine?

MR. LEVINE: I think that's right, your Honor. The Court's indulgence for a moment.

(Pause.)

[7382] MR. LEVINE: I think it may be 46, Judge. Yes. It's 46.

THE COURT: Sorry. I brought it in.

MR. LEVINE: We are talking about a document that is on Briscoe Company stationery and it is addressed to Deloitte & Touche.

THE COURT: Right.

MR. LEVINE: And it is signed by Briscoe, Abbamonte and Peterson. It is a three-page document.

MR. GELBER: Your Honor, we would lodge an objection to its admissibility. The objection I think we discussed at some length yesterday, but to summarize—

THE COURT: At that point you hadn't read it and I hadn't read it.

MR. GELBER: That's correct. I have reviewed it since then, and I believe it only has to do with the Belle Glade Apartments project audit which is not something that this witness went to. I think it is irrelevant, it is outside the scope of the direct.

I don't have any question. I don't believe there is going to be a problem proving authenticity or even a business record, although the [7383] witness I don't believe has gone into it. She may have but I don't recall, but my concern is the relevance and outside the scope. I suspect it is being offered to show that another project, that was the position of the company, at least, that the referenced regularities in Belle Glade suggested there were not irreg-

ularities in Wedgwood. I think it is irrelevant. It would be confusing to the jury.

THE COURT: Could you get more basic on that on the difference between the two? You are saying that she testified on which—I am trying to reconstruct all of this in my mind.

MR. GELBER: The $4.3 million that was alleged to be out of the project by the HUD audit was only on the Wedgewood Apartments project, and it is that audit which she endeavored to do for Mr. Briscoe when he hired her as the chief financial officer, so the testimony which she had referred to during the course of her testimony had to do with the Wedgewood Apartments project.

The Belle Glade project is another project apparently she did not work on as well. I believe there was only an audit done of that. I suspect that—

[7384] THE COURT: Now, the only reference here is Palm Glade.

MR. GELBER: It is the same project, your Honor. One is the City and one is the name of the project. The name of the project is Palm Glade. The City is in Belle Glade. I think we have—

THE COURT: Right.

MR. GELBER: So this is Briscoe Enterprises III. Her testimony dealt with the Wedgewood Apartments project. I just think it is a journey into something outside the scope.

THE COURT: Okay. Thank you.

Yes, sir.

MR. LEVINE: If it please your Honor, it goes to the question of where the money came from. She has testified on direct examination, and I must say contrary to what she told the FBI, that the money came from Wedgewood. She has already testified that there was in excess of $800,000 that was Mr. Briscoe's that came out of the Belle Glade project.

She has also testified that Deloitte & Touche put a clean bill of health on that audit down to every penny. she has

testified. She made representations to Deloitte & Touche with respect to [7385] that in excess of $800,000, and her representations are contained in Briscoe 46.

This document is part of the proof that shows the tracing of the money from Belle Glade to Wedgewood, and then she testified, you will recall, that the $691,000 that came out of—

THE COURT: There you are using Belle Glade and Palm Glade interchangeably?

MR. LEVINE: Yes, and that is always the case. To the extent it has caused anybody confusion, Belle Glade always equals Palm Glade, your Honor. One is the name of the project. The other is the name of the City. Bell Glade and Palm Glade are always the same. I think the government and defense agrees on that proposition.

MR. GELBER: That's correct, your Honor.

MR. LEVINE: And they may be used interchangeably. So the money comes out of Belle Glade. The propriety of the money coming out of Belle Glade is in part established by this document, and we are tracing the money from Belle Glade into Wedgewood, and you will recall her testimony was that $691,000 came out of Wedgewood and that it was used by Mr. Briscoe to buy houses and cars and it was rent revenues. She said that it was all rent [7386] revenues that came out of Wedgewood and he took the money as though the loot, the entity, and put it to his own use and in some protective form so as to avoid the consequences of personal bankruptcy.

You will recall she referred to upon inquiry by Mr. Gelber to the Texas Homestead Law which enabled them to protect those kinds of assets.

This is part of the proof that directly refutes that.

THE COURT: How? I have read it.

MR. LEVINE: There are—it does it in a couple of ways, your Honor. First, it deals with the related entities issue.

THE COURT: Isn't this just conveying some sort of conditions or whatever you want to—whatever term would

be appropriate to Deloitte & Touche in connection with what they are being asked to do?

MR. LEVINE: As a matter of fact, she wrote this document, your Honor.

THE COURT: Right.

MR. LEVINE: She is the author of it and we have another version of that which proves that. Your Honor, our contention, and she concedes that in [7387] excess of 800,000 came out of Belle Glade that belonged to Mr. Briscoe. This document confirms her belief that that is true, that that is accurate, because she participated in the audit. Indeed, she wrote this document. She is its author. The other signed it but she is the author of it, and it confirms her belief later used by Deloitte to be sure, but it confirms her belief that the monies that came out of Belle Glade to Mr. Briscoe were his.

MR. GELBER: Your Honor, this is not at issue. According to defense attorney's own comment just now, to confirm her belief she concedes the point. It is not at issue before this jury. It is something that had to be said in order to understand something to do with Wedgewood, but the witness hasn't said anything contrary to this document. It is not at issue, and the problem I have is every time we put a document like this into evidence it is waved around as if it has some importance it doesn't have. The witness hasn't said anything contradictory. Counsel said she has that belief.

It is cumulative, so in addition to the relevance and outside the scope if there is something at issue this clearly is not an issue with [7388] the jury. There is no need to throw another document in front of them to be waved around as if it presents something that is at issue.

MR. LEVINE: Your Honor, that is the question of weight. If we think it is significant, we will argue it is significant. If they think our argument is flawed and it really is insignificant they will say that, and somewhere in the mix of all this the jury will come to a decision, but that is what makes lawsuits. We disagree. The question here is not its weight. The question here is whether it

is admissible, and it clearly is relevant. It deals with this aspect—

THE COURT: Well, I always have to make a Rule 403 determination. We are in our eighth week now and I have to figure out whether it is going to waste time, confuse the jury and so on.

MR. LEVINE: How can it possibly waste time? She has already identified the document. How can it confuse the jury? It deals—it illuminates the jury. It doesn't confuse the jury. It goes right to the heart of the case, your Honor, to the heart of the case that has not been permitted. This is all 404(b). This is all outside this indictment, but that having been said and the government having [7389] adduced it, we have to refute it.

This woman testified, your Honor, this witness testified that this man looted $691,000. If this jury believes that, if we can't refute that they are going to convict him.

THE COURT: Well—

MR. LEVINE: This document shows that she didn't believe it. This document proves that or is part of the proof of that. This is a crucial document, your Honor, and it has become very clear to me that the objections are not based on the law when the government raises these objections. They object when the evidence hurts. You bet this hurts. This refutes their evidence. This is a fundamental piece of evidence, your Honor, and we need to introduce it. It meets all the legal standards. It is relevant. Its probative value is very significant. It wastes no time and causes no improper prejudice. It goes right to—it contradicts her evidence on direct examination. That's what it does.

THE COURT: I asked you in what way and you have not given me an answer yet other than your speech.

MR. LEVINE: That's not so, your Honor. I [7390] respectfully disagree. I have made an argument and I have tried to tell you, and your Honor has said you read this document. Let's read it together, if you would like.

Let me invite the Court's attention to paragraph 5A.

THE COURT: No. I have read the document, Mr. Levine.

MR. LEVINE: Well, you have asked how, and the answer is in paragraph 5A. The following have been properly recorded or disclosed in the financial statements. A, related party transactions and related amounts receivable, that's this, or payable including sales, purchases, loans, transfers, that's this. Leasing arrangements and guarantees. It says there they are properly recorded, your Honor. There is $800,000 here. That's what we are talking about, over $800,000 of properly recorded monies that were coming out of Belle Glade and went to Mr. Briscoe. That's proper. This is the first link in the chain of the proof. There are $800,000 and she said it.

She said that that was properly recorded, and she said there was an audit and she said that the audit gave a complete bill of health to the Belle Glade project and not one penny is missing. [7391] That's this $800,000, and if you follow this $800,000, you will see that that $800,000 that belonged to this man went into Wedgewood, and from that money, your Honor, the proof will be, that $691,000 came out and it was his money, and she said, contrary to that, that $691,000 came from rent that was Wedgewood's money and that he took it from the project and put it into his own house, his own car, his son's house, his son's car, all to be protected.

THE COURT: I know all the things that were said.

MR. LEVINE: That is the answer.

THE COURT: If you would talk about the exhibit.

MR. LEVINE: That is the answer, your Honor. It goes right to the heart of it.

THE COURT: Any comment now that he has stated what his reason is?

MR. GELBER: Your Honor, evidence should be put before a jury that is at issue. Now, that part—the Belle Glade's audit in regularities or irregularities, no one said there were irregularities. It is not an issue. It is not part of the process which is in contention of this jury's [7392] mind or by the government's evidence. It is, therefore, not relevant.

What he is intending to do is no more than putting a document in to confuse the jury into thinking that the Belle Glade audit, which the witness said had no irregularities, proves the point, and it is not at issue. It is what happened after that which became an issue, and my objection is based on numerous grounds. Not only cumulative, but it will confuse the jury because the witness has not contradicted it and counsel says why it is at issue. It's not at issue in the government's proof. It is not at issue in the 404(b) allegation, and, therefore, it shouldn't be in front of the jury in the context and at the level the counsel wants to put it in.

MR. LEVINE: Does the government want to stipulate that that excess of $800,000 that came from Belle Glade was properly put into the Wedgewood accounts? If they want to stipulate to that we might be able to deal with this issue, but if they say it is not at issue, let's hear a concise one-sentence, nontime-consuming, nonconfusing stipulation that that's the case.

THE COURT: Any comment, Mr. Gelber?

[7393] MR. GELBER Your Honor, the witness has already testified to matters. I am not going to enter into any stipulations.

MR. LEVINE: That is the problem. I want to prove it then.

THE COURT: I think we have heard enough. I conclude that the exhibit is not admissible under Rule 403.

MR. DAVIS: Your Honor, may I say something? I am concerned about the Court's 403 balance here because I am coming up on cross-examination now and this doesn't really have anything to do with my part of the case. This lady has been on the stand now this will be the fourth day, and that is has all been on direct testimony. The allegations have been made against Mr. Briscoe, as I understand it, that he looted the money from the corporation.

Now, all Mr.—that is at issue. Even though it is for 404(b) purposes, that is at issue. It seems to me that

Mr. Levine ought to be able to adduce evidence showing that he didn't take it out of the corporation.

Your Honor, if you made a determination by 403 that it is going to waste time and confuse the [7394] jury, then I am going to make a motion to strike all of her direct testimony, Judge, because when you do a balancing test and we are talking about outweighing it we are talking about a five-page document that is going to take three minutes to put in and we are talking about ten hours of testimony on the others that has nothing to do with my client or nothing to do with Leonard Briscoe's charge.

It has to do with 404(b), so I would like a little more concise description on the record as to what this balancing act is and in terms of how the prejudice substantially outweighs or how the confusion or the cumulative aspect substantially outweighs what Mr. Levine is trying to do, because I can't for the life of me figure it out. The Court has used some logic in terms of balancing this out but that has been placed at issue. I am coming up here next and I need to have some guidelines in terms of what I can get into in terms of 403(b), because it seems to me sitting back here in the peanut gallery—

THE COURT: I think you meant 404(b).

MR. DAVIS: 404(b). It seems back in the peanut gallery, if Mr. Levine gets up and I get on later on and I want to put in an exhibit, that [7395] because it has somehow been asked in one question before that the Court will sustain an objection on the grounds it is cumulative. We have had three days. This is going to be the fourth day of 404(b) material that has nothing to do with the indictment, so I am going to ask the Court to rethink or reconsider its decision because it is just sitting back here not knowing anything about this aspect of the case but knowing I get to cross-examine her about it, I have been watching three days of accusations against Mr. Briscoe saying he looted his company.

Now, Mr. Levine ought to have a right to show that he didn't loot his company and if she testified about a

subject or about an amount of money then it is at issue, then it is relevant. It is—the relevancy has to do like Mr. Levine says. The question is not the admissibility. It is the question of weight, so I don't understand the Court's ruling. It seems to me it is a hundred percent relevance. It is that money and it is certainly not cumulative or in danger. The danger of confusing the jury is a whole heck of a lot less than four days of testimony that come in under 404(b) when the jury has been told only that, well, [7396] it is to be considered for limited purposes and not told what the limited purposes are.

MR. LEVINE: Your Honor, this evidence not only shows not only part of the proof that he didn't loot it; it comes in to show that she knew it didn't. This very witness.

THE COURT: We have spent a half hour on this exhibit and I have ruled. How much more do you—

MR. LEVINE: Your Honor, as always, I will follow the rulings of the Court. May I make one suggestion? May I offer it, your Honor, if I redact, if I redact everything else in the letter except what it is and the paragraph I have read so it would be the introduction, the paragraph 5A and then the signatures?

MR. GELBER: We have the same objection, your Honor. Your Honor, we are ready to put the witness on the stand.

MR. LEVINE: The government's impatience with our injustice is remarkable. They are ready for sentencing, your Honor.

MR. GELBER: Your Honor, shall I call the witness?

THE COURT: Anything else before we [7397] resume?

MR. LEVINE: Yes. I would like a ruling on the proposal that it be redacted and be admitted in redacted form.

THE COURT: You are asking me to rule on—you want—I have been given an exhibit which I have concluded is not admissible. Now you want me to sit here and redact it.

MR. LEVINE: No. I told you the redaction. I want to redact it and I am moving it into evidence in the redacted form and I have described the redaction. It would have the introductory paragraphs that show The Briscoe Company, Deloitte & Touche, and the first two paragraphs on the front page. It would be on page 2 only, paragraph 5A, the rest of the page redacted, and on the third page the signatures. That's the redaction. I move it in in that form.

THE COURT: It would take me a half hour to sit down and read this and figure it out and hear from the government.

MR. LEVINE: I would like the Court to spend what such time as it needs to accommodate this. This is in the interest of justice. This is the proof that directly contradicts what this [7398] witness said on direct examination. Incidentally, over our objection.

THE COURT: I think we will move forward. Does anybody have anything else?

MR. WELLS: Your Honor, I would like to say for purposes of the record I join in comments by Mr. Davis and Mr. Levine.

MR. LEVINE: I move to strike as well, your Honor, all the testimony on direct with respect to this issue, the $691,000, and I would like a ruling on that.

THE COURT: The motion is denied.

Anything else?

MR. GELBER: Your Honor, I am going to get the witness.

(In open court, jury present.)

THE COURT: Good morning, ladies and gentlemen. Thanks again for both your promptness and your patience and sorry to have held you up. My other preliminary matters took longer than I anticipated.

I gave you a series of preliminary instructions before we started, and I have given some other instructions as we have gone along, and [7399] as you know, you will

get lengthy and written instructions at the tail end. Funny courthouse here. We hardly ever seem to have any medium-size trials. We seem to have short trails or we have long trials, and in long trials it doesn't always occur to me that, wait a minute, the jury, perhaps there is an instruction that I will be giving them in a couple of weeks that it would be desirable for them to be aware of now, and thinking over the evening recess it occurred to me that there is one thing that I should point out to you, and this will be one of the instructions basically that you will get at the end of the case.

Now, you have heard evidence that certain witnesses met with the prosecutors, went over their testimony and reviewed paperwork in advance of trial. You are instructed that there is nothing improper about this and this is typically done in preparation for trials to ensure that evidence is presented to the jury in an understandable and coherent manner. This goes both ways, of course. We expect to have defense evidence before too long and counsel for both the government and the defense have the right and the obligation to consult in advance of court appearance with any witness and no [7400] inference should be drawn because counsel conferred with or discussed the expected testimony with the witness in advance.

When we recessed last evening Mr. Levine was conducting his cross-examination of Ms. Abbamonte.

Mr. Levine.

MR. LEVINE: Thank you, your Honor. If it please the Court.

CROSS-EXAMINATION (Continued)

BY MR. LEVINE:

Q. Ms. Abbamonte, when we recessed last evening you had testified that you recalled having testified on direct examination that some $691,000 was taken by

Mr. Briscoe from the Wedgewood Plaza account, monies derived from rents, and in anticipation of his own personal bankruptcy took that money to buy houses and cars for himself and his son; is that correct?

A. Substantially, yes.

Q. Is it totally correct?

A. $691,000 moved from Wedgewood Associates' checking account to Cantey & Hanger, Mr. Briscoe's Fort Worth attorneys.

Q. For the purpose, you said, of buying [7401] houses and cars for himself and his son in anticipation of bankruptcy; isn't that correct?

A. Let me give a—

Q. Just answer the question.

MR. GELBER: Your Honor.

THE COURT: The witness may answer the question, Mr. Levine.

MR. LEVINE: But the question that I asked, your Honor—

MR. GELBER: Your Honor.

THE COURT: There are problems with the question that you asked, Mr. Levine, which are apparent, and if you would, please, let the witness answer the question.

A. Okay. $691,000 did go to Mr. Briscoe's attorneys. The stated purpose for it to move there was to make a bond payment for Wedgewood Associates. The money, some of which stayed with Cantey & Hanger, about $85,000. The rest was wired, a little bit over $600,000, to an account in Mr. Briscoe's name at the Credit International Bank in Washington.

Q. And you told this jury on direct examination that the purpose of it was in face to face with pending bankruptcy to buy houses and cars [7402] so that these assets could be protected under the Texas Homestead Statute, which meant that they were not reachable by creditors in bankruptcy; is that correct?

A. Yes. Some of the money from the Credit International Bank came back for that purpose.

Q. Now, you didn't tell the jury on direct that the money was transferred for the initial purpose of making a bond payment; you didn't tell them that, did you?

A. I may have. I certainly should have.

Q. Yes, you certainly should have.

A. I know I stated it was wired from Wedgewood Associates to Cantey & Hanger.

Q. And the impression that you created and intended to create was—

MR. GELBER: Objection, your Honor.

THE COURT: Could you ask her about her testimony, please, without characterizing it.

MR. LEVINE: Yes.

Q. And you told the jury that this was done for the purpose of beating this bankruptcy which was looming on this horizon, isn't that correct?

A. The money that was wired back to Mr. Briscoe from the Credit International Bank in [7403] Washington was used to—was put into a house for Mr. Briscoe.

Q. Now, you told the jury that this bankruptcy was immediately ahead of him; isn't that true?

A. That's true. This was—yeah. Okay. At that time, yes, we did anticipate Regalridge's bankruptcy.

Q. Not Regalridge's bankruptcy, Ms. Abbamonte, Mr. Briscoe's personal bankruptcy; isn't that correct?

A. Overton—I mean I have to give you a full answer.

Q. We only want full answers.

A. Regalridge and Overton Ridge in Forth Worth were about to go into the Bankruptcy Court. Mr. Briscoe was personally liable for the Overton Ridge debt. If the bank required him to pay the money back on that debt he would have had to declare personal bankruptcy.

Q. That's your legal conclusion, isn't it?

A. No, that's not my legal conclusion, sir. I can't draw a legal conclusion.

Q. That's right. The fact is that you told the jury that the transfers were made to Mr. Briscoe [7404] so that he could take those dollars, buy assets that were

protected from bankruptcy, specifically houses and cars, because he was going into personal bankruptcy; isn't that right?

A. It was a potential for him to go into personal bankruptcy.

Q. And that was only a potential, right?

A. It was a close enough potential that that was the strategy that was done.

Q. Let's deal with that potential.

The fact is never did Mr. Briscoe declare personal bankruptcy; isn't that true?

A. I do not know that. While I was there, no, he did not.

Q. And, as a matter of fact, it is true that from this date while you were there to this date he has never declared personal bankruptcy; isn't that the fact?

A. Well, you are making a statement that I cannot say, Mr. Levine.

Q. You just don't know?

A. I don't know that.

Q. If you don't know, just tell us you don't know, Ms. Abbamonte.

MR. GELBER: Objection.

[7405] THE COURT: The objection has been sustained. That has been covered. Let's move on.

Q. You told us yesterday, Ms. Abbamonte, that Mr. Briscoe was entitled to receive personally over $800,000 from Belle Glade; isn't that right?

A. Briscoe Enterprises Limited, the developer, was entitled to receive those funds. I would really hate to say without looking at Belle Glade's documents whether he was entitled to receive them personally.

Q. Well, you told us yesterday that you were aware that he was over over 300—excuse me, over $432,000 for developmental costs that he advanced; isn't that right?

A. I did not say that. I said $432,000 was drawn down on a draw from Belle Glade and was stated for general requirements. Mr. Briscoe at that point did not put $432,000 in the project.

Q. He had advanced that money; isn't that true?

A. That's not what I said, Mr. Levine.

Q. That is what you said yesterday, isn't it, Ms. Abbamonte?

A. No, that's not what I said.

Q. In any event, it was money that he was [7406] entitled to and properly booked in Belle Glade; isn't that correct?

A. The developer was entitled to that money. The developer was Briscoe Enterprises Limited.

Q. All right. The developer, Briscoe Enterprises Limited, was entitled to $432,000; isn't that right?

A. It was drawn down, that's true. I am going to assume it was appropriate.

Q. You have no evidence that it was inappropriate?

A. No.

Q. You, in fact, yourself knew it was, in fact, appropriate; isn't that true?

MR. GELBER: Objection, your Honor. Just asked and answered.

THE COURT: I think it has been covered.

MR. LEVINE: Your Honor, may we go to side bar?

THE COURT: Yes, sir.

(At the side bar.)

MR. LEVINE: Your Honor, the exhibit which we just discussed proves that she knew it, and I want to, again, renew my motion to put it into evidence. I want to ask her about it because this [7407] is what she said, and I have the earlier iteration of this, your Honor, and I can prove that she is the author of it, and although there are three signatures here, I have a copy of it with hers as the only signature which is the first of the three. She wrote this. She knew it, and when she says what she just said, she is hedging, and I want to use this document.

MR. GELBER: Your Honor, the witness isn't hedging. My objection was repetition, because she has agreed on I think at least twice, maybe even more than that given

the fact he has asked it a few different ways to the point Mr. Levine is making. That is the only reason I am here. I have the same objection to the document being introduced as I raised before. This record is very clear and going to show whatever Mr. Levine's argument is he is not entitled—I mean this witness is not hedging. The witness is saying exactly what she thinks.

MR. LEVINE: She just said that she assumed, but she didn't seem to know. This says she knows. She didn't —she said she assumed he was entitled to the transfer but she wasn't prepared to say that she knew it.

MS. ROGERS: Appropriate.

[7408] MR. LEVINE: And this says she knew it.

MS. METLIN: And said it was appropriate.

MR. LEVINE: And said it was appropriate, too. I want to use it now.

I would ask the Court—I don't want to do it—although I knew it was notwithstanding the Court's order based on her new approach to this, her new testimony.

THE COURT: What is the new approach?

MR. LEVINE: Yesterday she conceded that Mr. Briscoe was entitled to the excess of $800,000. Today she just said she assumes it. I want to prove that she knew it. I don't want an assumption. I want to use this, and in the ordinary course I would be able to do it without coming to side bar, but this Court has put me on notice of contempt.

This Court is chilling my abilty to cross-examine the witness, so I want to come over in a cautionary way—

THE COURT: Mr. Levine, I normally don't get through the day without quoting contempt on 42(a). I want to be fair to you. I am trying to be fair.

MR. LEVINE: I don't think you are being fair to me. I am trying to defend this case. I [7409] have come to side bar because I want to do it with the Court's permission. That's what I have come here for. I have come here to ask the Court's permission and the Court's response to my request for permission is the threat of holding me

summarily in contempt. That is, I submit, not right. I would like to get back to the issue in this case, your Honor. I would like to use this document.

THE COURT: The objection that I have before me is the objection to the question. The objection is sustained.

MR. LEVINE: There is no question before the Court. I asked to come to side bar.

THE COURT: Please do not talk quite so loud. I thought that you asked the question and I thought there was an objection. Am I—

MR. GELBER: That is exactly right, your Honor. I thought we came here because I had said from the well asked and answered. I am not sure I did, but sometimes to say—we have in mind that the counsel did it because it is an argumentative objection. I have the same objections I have to the document.

Not only have we done it three times today, but Mr. Levine, as he said a moment ago, we [7410] did it yesterday, too, and he is badgering the witness on the same point she has conceded in two different ways.

MR. LEVINE: If the government would say she conceded, it would be very simple, your Honor. This is a very simple proposition. I am not trying to be contentious. If the government wants to tell the jury it conceded, that is fine.

THE COURT: Let's move on, Mr. Levine. There was an objection. I have sustained it.

(In open court, jury present.)

THE COURT: You may proceed, Mr. Levine.

BY MR. LEVINE:

Q. In addition to the $432,000 to which Briscoe Enterprises was entitled, I believe you testified yesterday there was another $400,000 to which it was entitled; isn't that correct, and that was in the form of construction overhead?

A. Mr. Levine, I will be happy to tell you that $432,000 of general requirements and $312,000—$312,500 of supervision was drawn from Belle Glade and was given to Briscoe Enterprises Limited. It was on a draw. I will not make a certification, a legal judgment, an accounting judgment it was proper. I would be happy to tell [7411] you it did do that.

MR. LEVINE: Now, your Honor, I would like to come to side bar again.

THE COURT: All right.

(At the side bar.)

MR. LEVINE: Briscoe 46 shows that she did, in fact, at that time make the certification. Her certification. She won't give it to me now. I can prove that she did it then. I would like permission of the Court to do that.

MR. GELBER: Judge, I have the same objection. Not only the same objection—

THE COURT: I can't hear you.

MR. GELBER: I have the same objection. Not only the same objection, but your Honor rules about badgering witnesses about the same subject.

THE COURT: Right. It is extraordinary.

MR. GELBER: To the extent you can put things in reference, I as opposing counsel feel obliged to give some leeway, but this isn't putting it in reference. He is arguing it again in the same way be argued it yesterday which was improper, and now he is trying to put it at issue by arguing with her more, and we have done this already. We have gone down this road, and he spent a lot more time on [7412] cross than I did on direct, and it is time that he move on.

MR. LEVINE: I am sure they do, because this is painful. This goes right to the heart of their case and they know it, and this document proves it, and we know the truth, and they are here trying to conceal it.

THE COURT: Let's move forward, please.

(In open court, jury present.)

THE COURT: Yes, sir. You may proceed.

MR. LEVINE: I would like to approach the witness.

BY MR. LEVINE:

Q. I show you what has been marked as Briscoe Exhibit 46 for identification.

MR. GELBER: Objection, your Honor.

THE COURT: Could we talk for a minute, please.

(At the side bar.)

THE COURT: I can't remember if you showed it to the witness yesterday or not.

MR. LEVINE: I did. She identified it.

THE COURT: It has been excluded from that witness. Now you want to show her again.

MR. LEVINE: Yes. To refresh her [7413] recollection. This is the bowl of linguini. I want to refresh her recollection. I want to ask her if this refreshes her recollection as to whether or not she certified this.

MR. GELBER: Judge, this entire line of questioning has been gone into twice, maybe three times now. The last objection was badgering which was sustained. Now he wants to badger her with more things. I have the same objections I have had, and I would ask that Mr. Levine move to the next area or to the next question which has not been asked before, which is outside the scope—which is within the scope of permissible cross-examination. This is getting a little—I mean this is a Kafka thing we are doing here.

MR. LEVINE: You are not kidding.

MR. GELBER: The Court gives a ruling. Mr. Levine comes down and starts going into the same area. This is the third or fourth time. I am not sure what we are doing here, but I know this is—well, I have said more than I should have.

THE COURT: Let's move forward, Mr. Levine.

MR. LEVINE: Your Honor, you are not going to permit me to use this to refresh—you are [7414] saying I cannot use this to refresh recollection?

THE COURT: That's correct.

(In open court, jury present.)

BY MR. LEVINE:

Q. So, Ms. Abbamonte, there was 432,00 plus 300 and what?

A. 312,500.

Q. 312,500, so that's $750,000 that went to Briscoe Enterprises Limited; is that correct?

A. Yes. 744,500. That's true.

Q. $744,500, right?

A. Yes.

Q. That went to Briscoe Enterprises Limited in a proper way; isn't that true?

A. Mr. Levine, the money moved. I don't wish to nitpick. I did not do an audit of Belle Glade.

Q. But Belle Glade was audited, was it not?

MR. GELBER: Objection, your Honor.

THE COURT: We have covered this several times, Mr. Levine.

MR. LEVINE: I want to get it straight, your Honor, because the witness is changing the testimony and I want to get it straight.

MR. GELBER: Your Honor.

THE COURT: Let's have side bar [7415] conference, please.

At the side bar.)

THE COURT: Yes, sir.

MR. GELBER: Your Honor, I object to the area and I object to another—I am not sure that the Court's ruling has been—through the course of this trial we are not supposed to argue to the jury anything. Now Mr. Levine takes it upon himself to say to the jury his opinions to contradictions. It is not even a question. It is so improper I am not sure why—well, I think it is—I am not saying more.

MR. LEVINE: I will withdraw the remark, your Honor. I will move on.

THE COURT: I think I have no choice, Mr. Levine, but to hold you summarily in contempt. I sentence you to four hours of incarceration, beginning at the end of the trial today.

MR. LEVINE: I would like a lawyer, your Honor. May I have an opportunity before the Court does that to get a lawyer and review this matter?

THE COURT: Review 42(a).

MR. WELLS: Your Honor, I would only ask you, this is a criminal trial. We have there defendants here. The next witness is Mr. Levine's [7416] witness also.

THE COURT: It is interfering with the trial and interfering with his right to represent Mr. Briscoe. This trial has simply got to be controlled. Mr. Levine is not in control. I will issue the appropriate order.

MR. WELLS: Your Honor, what Mr. Levine and his lawyer do, that is between Court and Mr. Levine, his lawyer. To the extent the next witness is Mr. Levine's responsibility and is a major witness, I would ask you not to—I would ask you to reconsider the question of when this incarceration business is supposed to begin, because it is hard for Ms. Metlin and Mr. Clark and Mr. Levine to begin to prepare a major witness, which is a Briscoe employee, and it is his witness. I can't do the witness, Mr. Davis can't do the witness; yet to the extent we are in a joint trial, it impacts on us all.

I would ask you, at a minimum, to reconsider the commencement of any sentence because it interferes with the trial prep and thereby hurts the defendants and it hurts—it hurts all the defendants.

THE COURT: It is narrowly limited. It is [7417] four hours beginning at the end of the trial.

MR. DAVIS: The end of the trial, not today?

THE COURT: I am sorry. The end of the trial today.

MR. WELLS: That is the point. Tonight is a big night for him because he has got to prepare for his colleagues for a major—

THE COURT: There is plenty of light where he is.

MR. LEVINE: Your Honor, may I ask the Court to hold this in abeyance until the end of the trial or unitl such time as—

THE COURT: No, because you have so flagrantly, repeatedly violated my rules and conducted yourself in such a fashion that it is clearly a Rule 42(a) situation. I am not talking about a 401, section 401 type of proceeding of the trial.

MR. WELLS: Your Honor, again I am not trying to interfere—

THE COURT: You are not from this area. Mr. Levine knows the importance of having four hours as opposed to a longer period of time. I want to make it clear that this case is going to be tried [7418] properly within the bounds of advocacy that is proper. That is my ruling.

MR. WELLS: I understand. Your Honor, I have got a very limited experience with this, but what happens usually in a case like this is instead of the defendants spending the four hours in jail or if they spend an hour they have got other people running around to Appellate Courts and everything gets off track, and I am only—there is one more witness that he has responsibility for, the next witness.

The next two witnesses are mine, and I am only asking your Honor so that we can try and finish, the government can try and finish by Friday or Monday. Because there is a need to prepare this next witness, that he has responsibility for that you not commence the sentence because it is going to impact on the sentence.

THE COURT: I have made my ruling.

MS. METLIN: Your Honor, can I speak on behalf of Mr. Levine, please?

THE COURT: Yes, ma'am.

MS. METLIN: Mr. Levine's wife died about a year and a half ago. He is a single parent. He has a 13-year-old daughter at home. In addition to [7419] the reasons stated by Mr. Wells, if you ask him to stay for four hours tonight without him being able to make arrangements to deal with his daughter's care, it poses an extraordinary hardship. I just ask your Honor to hold that stay of incarceration just until next week so that he can make those arrangements.

THE COURT: That is why I am saying it now. I am very sympathetic to Mr. Levine's personal situation. I am very sorry about it, but I have an obligation. I can't believe that somebody can't arrange for a teenager to get a meal between now and when today's trial is over.

MR. DAVIS: Judge, can't you do it Friday night?

MR. LEVINE: Your Honor, may I ask this Court to stay the entire matter until tomorrow night, so after the court session stay the ruling, stay the incarceration, stay the lawsuit after the session tomorrow. We could address it, and maybe the Court will feel based on my conduct during the rest of the day that it won't wish to impose it or even make that finding.

THE COURT: I will take it up further. That is my finding. * * *

* * * *

[7429] THE COURT: Nice to see you, Mr. Kotelly. Yes, sir.

MR. KOTELLY: Thank you, your Honor. Your Honor I have entered into a precepice with my appearance on behalf of Mr. Levine. I would like to make a brief application, your Honor, for your Honor to stay your period of incarceration for this evening pursuant to the contempt citation. I request it for several reasons, your Honor. First of all, your Honor has imposed that sentence. I ask that it be at least stayed until the end of the trial. It is there. It is not going away.

We would like an appropriate time to argue that matter, but we think that once this case is concluded that

we would be in a better position to be able to assess exactly what the conduct was and hopefully there will not be any reoccurrences of what your Honor believes to have been improper conduct, but we think that for an orderly resolution of this matter that it would be more appropriate to stay the period of incarceration, at least to the end of the trial, and that's the motion that I am making before your Honor now.

THE COURT: All right. Thank you.

I have—must confess that I have never [7430] held anybody in contempt before. I don't know if the government has any right to say anything or wants to say anything or should or shouldn't, but I would ask if they—

MR. GELBER: Your Honor, we will decline to comment.

THE COURT: Okay. Rule 42(a), of course, Mr. Kotelly does talk about—basically it is a summary of contempt. I have thought about the penalty and consider it to be appropriate and, indeed, very lenient for a number of reasons. As I indicated to Mr. Levine, I don't want to interfere with his representation of Mr. Briscoe. I don't want to send him to the District of Columbia jail so it is being fashioned so that he can serve the four hours here in the cell block in this courthouse where he can have access to anything he wants, and I believe it is quite appropriate, and your motion for a stay is denied.

MR. KOTELLY: Thank you, your Honor.

THE COURT: Thank you.

Anything else before we resume?

MR. GELBER: Not from the gvernment, your Honor.

* * * *

STATUTORY PROVISIONS INVOLVED

1. *18 U.S.C. § 401 provides*:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority; and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

2. *Fed. R. Crim. P. 42 provides:*

(a) **Summary Disposition**. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The de-

fendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

(2)

No. 94-1053

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

BARRY WILLIAM LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly used its summary contempt powers to find petitioner guilty of contempt based on his conduct during a trial.

2. Whether the district court should have referred the question of petitioner's contempt to another judge for a hearing.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 27 F.3d 594. The order of the district court (Pet. App. 10a-61a) is reported at 839 F. Supp. 36.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1994. A petition for rehearing was denied on September 15, 1994. Pet. App. 63a. The petition for a writ of certiorari was filed on December 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a criminal defense lawyer, was summarily held in criminal contempt under Fed. R. Crim. P. 42(a) and 18 U.S.C. 401(3) during a criminal trial in the United States District Court for the District of Columbia.[1] He was sentenced to four hours' imprisonment. Pet. App. 62a. The court of appeals affirmed. *Id.* at 1a-9a.

1. During the trial, petitioner repeatedly ignored the district court's orders. The last instance occurred on November 19, 1992, the 34th day of trial, when petitioner stated in the jury's presence that a prosecution witness was changing her testimony. The district court summarily held petitioner in contempt. Pet. App. 1a-2a.

The district court entered a written order that certified that petitioner's contemptuous conduct was committed in the presence of the court and that the court had personally observed it. Pet. App. 10a. The court recognized that summary contempt under Rule 42(a) "is an extraordinary power that must be reserved for 'exceptional circumstances.'" Pet. App. 10a (quoting *Harris* v. *United States*, 382 U.S. 162, 164 (1965)). In particular, the court stated that summary contempt is appropriate only when there is "a compelling need for an

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[1] The trial was *United States* v. *Briscoe*, Crim. Nos. 91-399-SSH & 92-86-SSH (D.D.C.). The three defendants in that case were convicted of accepting illegal gratuities, in violation of 18 U.S.C. 201(c)(1)(A), and the convictions of two of the three were affirmed. *United States* v. *Wilson*, 26 F.3d 142 (D.C. Cir. 1994). The prosecutions arose out of separate but related investigations by Independent Counsel Arlin M. Adams (see 28 U.S.C. 592) and the United States Attorney for the Southern District of Florida. The investigations led to separate indictments returned in the District of Columbia and the Southern District of Florida. The indictments were consolidated for the trial in which petitioner was held in contempt. See *Wilson*, 26 F.3d at 145-146; Pet. App. 12a n.2.

immediate remedy or time [is] of the essence," and "there has been an 'actual obstruction of justice'." *Ibid.* (quoting *In re McConnell*, 370 U.S. 230, 234 (1962)).

The court held that those exceptional circumstances were present here. The court explained that petitioner had "continually defied the Court's explicit and direct orders," even after "numerous, unequivocal warnings that persistence in his course of conduct would result in a finding of contempt." Pet. App. 11a. As part of its order, the court set out "only selected instances from the two weeks of trial immediately preceding" the contempt finding, in each of which petitioner had "persisted in a course of conduct in defiance of a previous ruling of the Court." *Id.* at 12a-13a.[2]

The court also determined that "summary procedures are necessary in this case." Pet. App. 12a. Observing that the trial involved three defendants and ten attorneys, the court determined that "[u]nless the Court took a significant, immediate step to deter the misconduct of [petitioner], this already protracted and extraordinarily unpleasant trial, which is now entering its ninth week, risks becoming unmanageable." *Ibid.*

2. On appeal, petitioner argued that his conduct did not warrant a finding of contempt, that the district court should not have used its summary contempt powers, and that any contempt proceeding should have been held before a different judge. The court of appeals rejected

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[2] In addition to setting out portions of the trial transcript from the preceding two weeks, the court incorporated the entire record by reference, explaining that it could not "feasibly list every one of the numerous instances of [petitioner's] misconduct," and that "a written transcript cannot capture adequately the tone and behavior of [petitioner]." Pet. App. 12a-13a.

those arguments and affirmed his conviction. Pet. App. 1a-9a.

The court of appeals held that the evidence supported a finding of contempt under 18 U.S.C. 401(3), which authorizes a court to punish as contempt "[d]isobedience or resistance to [the court's] lawful writ, process, order, rule, decree, or command." Pet. App. 3a. The court noted that the finding was prompted by petitioner's defiance of a trial court ruling, in which petitioner repeatedly questioned a witness about an exhibit known as "Briscoe 46" after the court had ruled it inadmissible, had repeated that ruling several times, and had repeatedly directed petitioner to move on to another topic. *Id.* at 3a-5a. The court of appeals determined that the trial court's ruling on Briscoe 46 was clear, and that petitioner's defiance of that ruling was willful. *Id.* at 4a-6a. In connection with its willfulness determination, the court of appeals found that petitioner "intentionally circumvented the [trial] court's orders in order to make the jury aware of a document the court had ruled inadmissible." *Id.* at 5a-6a.

The court of appeals next held that the district court did not abuse its discretion by using the summary procedures of Rule 42(a) instead of the notice and hearing procedures of Rule 42(b). Pet. App. 6a-7a.[3] The

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[3] Federal R. Crim. P. 42 provides in pertinent part:

(a) **Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. * * *

(b) **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of

court of appeals noted that, in *In re Holloway*, 995 F.2d 1080 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994), it had "approved summary contempt proceedings because the trial judge had warned the defendant to heed her rulings on pain of contempt; had repeated several times the threshold showing necessary to proceed with a particular line of questioning; and had warned the defendant that his continued inquiries violated the court's order." Pet. App. 7a (citing *Holloway*, 995 F.2d at 1087). The court of appeals determined that "[t]he same factors appear here." *Ibid.* The court concluded that petitioner's "blatant disregard for the court's authority, thereby threatening its ability to ensure an orderly and fair trial, justified a summary finding of contempt." *Ibid.*

Finally, the court of appeals held that the district court judge had not become "personally embroiled" in the controversy with petitioner, and that it therefore was not necessary to refer the contempt issue to another judge. Pet. App. 7a-9a. The court of appeals determined that, "[a]lthough [petitioner] questioned the trial judge's impartiality, there is nothing in the record indicating any bias or partiality on the trial judge's part; on the contrary, the record manifests an extremely patient district judge ultimately driven to use his contempt power." *Id.* at 8a. The court of appeals also noted that, in *United States* v. *Meyer*, 462 F.2d 827 (D.C. Cir. 1972), it had stated that "the need to preserve order" may "outweigh[] the possibility of bias on the part of the trial judge," so as to justify a summary finding of contempt even if "the judge has evidenced personal embroilment." Pet. App. 8a (quoting *Meyer*, 462 F.2d at 843). The court

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the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. * * *

of appeals in this case repeated, however, that "[n]othing in this record * * * indicates that the judge was personally upset by or indeed anything but patient with [petitioner]." Pet. App. 9a.

ARGUMENT

1. Petitioner contends (Pet. 8-12) that the district court erred by using its summary contempt power under Fed. R. Crim. P. 42(a) to punish his course of defiant conduct during the trial. The Court recently denied review of this same issue in *In re Holloway*, cert. denied, 114 S. Ct. 1537 (1994) (No. 93-996), and there is no reason for a different result here.

Rule 42(a) states that a criminal contempt "may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Petitioner does not dispute that the judge saw and heard the conduct on which its contempt finding was based, and that the conduct occurred in the court's presence. Instead, petitioner argues (Pet. 9-12) that, in addition to the requirements set forth in Rule 42(a), an actual obstruction of justice is a prerequisite to the use of summary contempt procedures. That argument does not warrant further review, because both courts below properly determined that petitioner had caused such an obstruction.

The district court found that petitioner's contumacious conduct threatened to make the already lengthy trial unmanageable. Pet. App. 12a. The determination whether to impose summary contempt under Rule 42(a) rests in the discretion of the district court, see *United States* v. *Wilson*, 421 U.S. 309, 316-317 (1975); *In re McDonald*, 819 F.2d 1020, 1024 (11th Cir. 1987) (per curiam); *United States* v. *Moschiano*, 695 F.2d 236, 251-

252 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983), and the district court here acted within its discretion. Petitioner ignored the court's authority in front of the jury, repeatedly asked the witnesses questions that the court had already ruled improper, and forced the court to hold repetitious bench conferences and issue repetitious directives about petitioner's examination. See, *e.g.*, Pet. App. 14a-60a.

The substantive bases for criminal contempt are set forth in 18 U.S.C. 401(1) through (3). Because the district court did not specify which subsection of Section 401 covered petitioner's contempt, the court of appeals considered that issue as a threshold matter. See Pet. App. 2a-3a. The court of appeals determined that petitioner's conviction was based on 18 U.S.C. 401(3), which covers "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command." Pet. App. 3a. The court of appeals held (*id.* at 3a n.1) that it "[wa]s not necessary to find" that petitioner's behavior "actually 'obstruct[ed] the administration of justice,'" as required by Section 401(1). That holding was in accord with *In re Holloway*, 995 F.2d 1080, 1082 n.1 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994).

The question whether petitioner's conduct must have obstructed justice to violate 18 U.S.C. 401(3), however, is distinct from the question whether obstruction of justice is a prerequisite to the use of summary contempt procedures under Rule 42(a). The court of appeals addressed the latter question in a separate section of its opinion. Pet. App. 6a-7a. In that section, the court pointed out that, when a judge observes a contempt in the court's presence, the judge may punish it summarily to preserve order. *Id.* at 7a; see *Taylor* v. *Hayes*, 418 U.S. 488, 497 (1974). On the facts of this case, the court held

that a summary finding of contempt was necessary to preserve order (Pet. App. 7a):

> The judge frequently warned [petitioner] to heed his rulings and threatened him with contempt * * *; the judge told [petitioner] that the witness could not testify about Briscoe 46, * * *; and the judge reminded [petitioner] several times that he had already decided the inadmissibility of Briscoe 46. * * * Despite his diligent efforts, none of his warnings to [petitioner] worked—[petitioner] continued to disregard the court's orders and evidentiary rulings. In our view, [petitioner's] blatant disregard for the court's authority, thereby threatening its ability to ensure an orderly and fair trial, justified a summary finding of contempt; we therefore find no abuse of discretion.

Thus, the court of appeals held that summary contempt was warranted because petitioner's conduct actually disrupted the trial. It therefore plainly found "an actual obstruction of justice." *In re McConnell*, 370 U.S. 230, 234 (1962); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *Ex parte Terry*, 128 U.S. 289, 303, 307 (1888); see *Wilson*, 421 U.S. at 316 ("The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court.") (footnote omitted).

Petitioner contends (Pet. 9) that the court of appeals' decision conflicts with decisions of this Court, including *International Union, UMW* v. *Bagwell*, 114 S. Ct. 2552 (1994), and those of other courts of appeals. That claim is based on his erroneous view that, in affirming the use of summary proceedings, the court of appeals did not find

any actual obstruction of justice. Because the court of appeals did so find, petitioner's claim of a conflict is unfounded.

2. Petitioner also argues (Pet. 12-21) that the district judge became "personally embroiled" with petitioner and therefore should have referred the question of contempt to another judge. That factbound claim lacks merit.

The Court has recognized that, when contemptuous conduct causes a judge to become personally embroiled with the contemnor, the judge should excuse himself from the contempt proceedings. *Taylor* v. *Hayes*, 418 U.S. at 501. At the same time, however, the Court has made clear that not all contemptuous conduct prevents a judge from trying the person for contempt. In *Ungar* v. *Sarafite*, 376 U.S. 575 (1964), the Court held that a judge was not disqualified from trying a witness for contempt despite the witness's continued criticism of the judge, disobedience to his orders during trial, and "disruptive, recalcitrant and disagreeable commentary." *Id.* at 584. Even though that conduct offered a "possible temptation" to be biased against the defendant, the Court found that the judge had not become "personally embroiled" with the litigant, and the Court refused to "assume that judges are so irascible that they cannot fairly deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." *Ibid.*

Here, petitioner did not personally attack the judge; he simply disregarded the court's orders and, in the process, challenged the soundness of its rulings.[4] Under

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[4] For example, in the portion of the transcript that petitioner asserts (Pet. 14 n.9) shows that the district judge felt that his integrity was under attack, petitioner complained that the court had consistently overruled petitioner's objections, Pet. App. 23a. Rather than taking that complaint personally, the court responded

Ungar, mere "disobedience to court orders and criticism of its rulings during the course of a trial" are not enough to warrant disqualification. 376 U.S. at 584; accord *Nakell* v. *Attorney General of North Carolina*, 15 F.3d 319, 325 (4th Cir.), cert. denied, 115 S. Ct. 184 (1994); *SEC* v. *Simpson*, 885 F.2d 390, 398 (7th Cir. 1989). Hence, the district judge in this case was not required to disqualify himself.[5]

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that petitioner "ha[d] not made very good objections," and was "perfectly entitled to make a record." *Ibid.*

[5] Petitioner argues (Pet. 16, 18, 19) that the decision below conflicts with *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). In that case, the trial judge waited until the end of trial to find one of the defendants in contempt for his outbursts during trial. *Id.* at 463-464. The defendant also vilified the judge so repeatedly that the judge could not remain personally detached. *Id.* at 465-466. Neither of those circumstances obtained here. Moreover, the Court in *Mayberry* said that the trial judge in that case "could, with propriety, have instantly acted, holding petitioner in contempt," instead of waiting until after the trial. *Id.* at 463. Thus, *Mayberry* supports the judgment below. Likewise, in *Offutt* v. *United States*, 348 U.S. 11 (1954), the district judge waited until the end of trial to find a lawyer in contempt, and the judge clearly stepped over the line of impartiality, for he repeatedly yelled at the lawyer. *Id.* at 12, 15-16 & n.2. In contrast, the district judge in this case exercised the contempt power during the trial and, as the court of appeals observed, exhibited exemplary patience. Pet. App. 8a-9a. Finally, *Sandstrom* v. *Butterworth*, 738 F.2d 1200 (11th Cir. 1984), cert. denied, 469 U.S. 1109 (1985), cited by petitioner (Pet. 18, 19, 20), supports the judgment below, for the court of appeals there acknowledged that in most cases, a trial judge's summary contempt ruling during trial is not subject to reversal unless the contemnor shows that the judge bore personal animosity towards the defendant. 738 F.2d at 1213-1214.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BARRY WILLIAM LEVINE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. Respondent spends the majority of its Opposition Brief quoting from the factual recitations contained in the opinions below, in an apparent effort to demonstrate that Petitioner behaved improperly during his representation of his client at trial, and therefore deserved to be held in contempt. Needless to say, Petitioner is prepared to prove that, to the contrary, he never intentionally violated a single court order, but instead always strove to adhere to the court's rulings—while at the same time also upholding his duty to represent zealously the interests of his client. The important issue here, however, is that Petitioner has been totally precluded from proving this very point, due to the fact that he has been denied a hearing, before an impartial judge, with respect to any of the charges against him. As a result of this constitutional

deprivation, there can be little confidence in the accuracy of the factual matters asserted in the lower court opinions, and thus Respondent's reliance on them is misplaced.

2. Plainly, the court of appeals did not determine whether there was an actual obstruction of justice in this case—a prerequisite to the use of the summary contempt power under this Court's precedents. Respondent suggests that this Court should not review the propriety of the court of appeals' refusal to make this determination, on the grounds that the court of appeals made a similar omission in *In re Holloway*, 995 F.2d 1080 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1537 (1994), and this Court declined to review the *Holloway* decision. This contention is without merit. Respondent cannot argue that the denial of the petition in *Holloway* implies this Court's approval of the court of appeals' decision in that case, in light of the long-standing principle that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). To the contrary, the fact that this Court was called upon to address a similar question recently in *Holloway* demonstrates the recurrent nature of this issue, and militates in favor of the Court taking the opportunity to speak to this question.

Moreover, *subsequent* to the denial of certiorari in *Holloway*, this Court issued a decision emphasizing the importance of the requirement that the summary contempt power be used only in the presence of an actual obstruction of justice. In *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994), this Court noted that the contempt power "uniquely is 'liable to abuse,' " in that "[c]ontumacy 'often strikes at the most vulnerable and human qualities of a judge's temperament,' and its fusion of legislative, executive, and judicial powers 'summons forth . . . the prospect of "the most tyrannical licentiousness." ' " *Id.* at 2559 (citations

omitted). On that basis, the Court held that summary proceedings are permissible only " 'to maintain order in the courtroom and the integrity of the trial process in the face of an "actual obstruction of justice." ' " *Id.* at 2560 (citations omitted). The *Bagwell* decision thus sets the stage for a review by this Court of the propriety of the summary procedure utilized by the trial court in this case.

Finally, this case is readily distinguishable from *Holloway* on its facts. In *Holloway*, there could be little doubt that the attorney held in summary contempt was actually obstructing justice at the time the contempt citation was issued. The attorney in *Holloway* was told unambiguously by the trial court that he could not use the contents of a particular document to cross-examine a witness without laying a proper foundation, and was specifically instructed as to how to proceed.[1] Then in the moments im-

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[1] The trial court in *Holloway* directed the attorney as follows: "if you want to present [the document] to him and ask him if he has ever seen this particular document before, and not its contents, but the document itself, I will permit you to do that. . . . If this man has never seen that document before—and that's why I told you you must ask him if he has seen that document, not just those paragraphs contained in it—then he can't testify to it." 995 F.2d at 1089-90. The court then told the witness: "He's asking you to look at it to determine whether or not you have ever seen that document before." The attorney nevertheless immediately asked the witness: "Do you know what that document is?" The court interjected: "No, no, no. First of all, we just determine if he's ever seen it before." The court then asked the witness: "Have you ever seen that document before now?" The witness answered: "No, ma'am." *Id.* at 1090-91. The attorney nonetheless pressed on, asking the witness: "Do you know what that document is?" The court again reiterated the ruling it had made in the preceding moments: "If he has never seen it before, we are not going to ask him if he knows what it is." This still did not stop the attorney in *Holloway*. He asked the witness: "Having looked at it now, can you now tell us what it is, what that document is?" The trial court then advised the attorney: "this is the last time I'm going to tell you the objection is sustained." Undeterred, the attorney asked the witness: "Do you recognize any of the wording set forth in that document?" He was promptly held in contempt. *Id.* at 1091.

mediately preceding the contempt conviction in *Holloway*, the trial court directly and unambiguously ordered counsel several times not to ask the witness about the contents of that document. The attorney, in open defiance of the court, proceeded to ask the witness precisely the questions which the court had emphatically and repeatedly stated that he could not ask. The court then made clear to counsel that he had better not ask the same question yet again. Counsel immediately asked the same question again, and the court was left with no alternative but to hold the attorney in contempt. Thus, under the circumstances present in *Holloway*, the attorney's actual obstruction of justice was manifest.

In the present case, by contrast, Petitioner's statement which precipitated the contempt finding was in response to Judge Harris' observation that "[w]e have covered this several times, Mr. Levine." There was no admonition from the judge that Petitioner's interrogation was without foundation (as in *Holloway*); nor was there a series of misfired questions by Petitioner (as in *Holloway*). Instead, there was the spontaneous response to the trial court: "I want to get it straight, your Honor, because the witness is changing the testimony and I want to get it straight." No doubt, Judge Harris regarded the remark as argumentative, and thus, not an appropriate open-court statement. But it was not a retort by counsel spoken in defiance of the judge. Petitioner's spontaneous response sought only to explain to the judge in an abbreviated way why the question was asked. It was, moreover, just as promptly withdrawn, with Petitioner stating that he would move on (again, an apologetic attitude not present in *Holloway*). Nonetheless, Petitioner was summarily held in contempt, on the basis—according to the judge's written order filed 12 days later—that Petitioner's conduct during the days and weeks prior to the citation "cumulatively" amounted to contempt. This "cumulative" contempt citation—issued without a hearing as to a single incident that formed the basis of his conviction—thus presents a far more com-

pelling basis for review of whether a finding of an actual obstruction of justice is a necessary prerequisite to summary contempt.[2]

3. Respondent also attempts to demonstrate that, despite the court of appeals' clear statement that it would not determine whether Petitioner had actually obstructed justice because it believed (erroneously) that such an inquiry was unnecessary, the court of appeals somehow engaged in the very analysis it explicitly eschewed. This effort fails. As Respondent points out, the district court recognized that it was required to find an actual obstruction of justice in order to dispense with a hearing, and indeed made such a finding. That this finding was patently erroneous was a major contention of Petitioner on appeal. The court of appeals explicitly sidestepped this analysis in its opinion, incorrectly stating that the "obstruction-of-justice inquiry" was irrelevant because the court of appeals determined that Petitioner was convicted under 18 U.S.C. § 401(3) rather than § 401(1). Pet. App. 3a n.1. Although Respondent correctly notes that the court of appeals indicated considerable dissatisfaction with Petitioner's conduct, Respondent cannot avoid the fact that the only time the court of appeals refers to the "obstruction-of-justice inquiry" in its opinion is in the footnote in which it erroneously holds that such an inquiry is not necessary, despite the fact that the court dispensed with a hearing, held Petitioner summarily in contempt, and imprisoned him. It is clear that the court of appeals did not purport to engage in the obstruction of justice analysis required by this Court's rulings.

4. Respondent relies on *Ungar v. Sarafite*, 376 U.S. 575 (1964), for the proposition that, even if a trial judge

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[2] Moreover, the fact that Petitioner was not held in contempt at the time that any of these previous incidents occurred demonstrates that none of this prior conduct which formed much of the basis for the "cumulative" contempt finding amounted to an actual obstruction of justice.

feels that he has had his personal integrity and impartiality attacked by the alleged contemnor, there should be no presumption that he is "personally embroiled" so as to require that he refer the matter to another judge for a hearing on the contempt charges. This reliance is misplaced. In *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), decided after *Ungar*, this Court ruled that a judge who has been attacked by an alleged contemnor is not "likely to maintain that calm detachment necessary for fair adjudication," and thus recusal is required based on a presumption that a judge who has been attacked will be, or appear to be, biased against the alleged contemnor —even if the judge has demonstrated not hostility but great patience in the face of such an attack. This Court reiterated and extended this principle in *Taylor v. Hayes*, 418 U.S. 488 (1974), holding that, even where the judge has not been attacked, the judge is disqualified from ruling on the contempt when he is so embroiled in a controversy with the alleged contemnor that he cannot " 'hold the balance nice, clear and true between the State and the accused.' " *Id.* at 501 (citation omitted). " 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less." *Id.* (citation omitted). In *Taylor*, the Court distinguished *Ungar* on the grounds that "we were impressed [in *Ungar*] with the fact that the judge 'did not purport to proceed summarily during or at the conclusion of the trial, but gave notice and afforded an opportunity for a hearing which was conducted dispassionately and with a decorum befitting a judicial proceeding.' " *Id.* at 503 (quoting *Ungar*, 376 U.S. at 588).[3] In the present case, unlike

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[3] Likewise, in *Nakell v. Attorney General of North Carolina*, 15 F.3d 319 (4th Cir.), *cert. denied*, 115 S. Ct. 184 (1994), on which Respondent also relies, the attorney whose conduct was at issue was given a hearing on the contempt charges against him, at which he was represented by counsel, permitted to call and question witnesses,

Ungar, no hearing was held before Petitioner was convicted of criminal contempt.

5. Finally, Respondent argues that in the present case the conduct of Petitioner did not rise to the level of a personal attack. We agree that Petitioner's remarks would not be of the sort that a reasonable person would find offensive; nevertheless, the trial judge *did* find them offensive, and so much so that Petitioner's remarks regarding the correctness of the trial court's rulings formed much of the basis for holding Petitioner in criminal contempt. *See* Pet. App. 23a, 27a-28a, 38a-40a. What is important in determining the judge's personal embroilment is not the true nature of the remarks but their impact on the trial judge. In this case, the judge explicitly stated that he believed that Petitioner's remarks were an attack on his personal integrity and impartiality. *Id.* As the D.C. Circuit has itself ruled, in *United States v. Meyer*, 462 F.2d 827, 845 (D.C. Cir. 1972), recusal is ordinarily required when there is "an impugnation of the integrity and impartiality of the trial judge," because such remarks constitute "personal attacks" within the meaning of *Mayberry* and its progeny. Under such circumstances, the court of appeals held, it is "unlikely that the trial judge is a competent factfinder with respect to the alleged contempt." *Id.* at 840. Here, the trial judge's statement that he believed Petitioner attacked him in this manner is conclusive proof that he ought to have referred the matter to another judge for a hearing.

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and allowed to personally take the stand to explain his conduct. *Id.* at 325.

CONCLUSION

For the foregoing reasons as well as those stated in the Petition for a Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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